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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

CITY OF ANAHEIM,

Plaintiff and Appellant,

v.

ANGELS BASEBALL, L.P.,

Defendant and Appellant.

G037202

(Super. Ct. No. 05CC01902)

O P I N I O N

Appeal from a judgment and order of the Superior Court of Orange County,  
Peter J. Polos, Judge. Affirmed.

Rutan & Tucker, Michael Rubin, Todd Litfin; Sheppard, Mullin, Richter &  
Hampton, Sean P. O'Connor, Jeffrey Blank; City of Anaheim and Jack White, City  
Attorney, for Plaintiff and Appellant.

Luce, Forward, Hamilton & Scripps, George J. Stephan; Buchalter Nemer,  
Robert M. Dato, Efrat M. Cogan, Harry W.R. Chamberlain; Powell Goldstein, William  
Shearer, William V. Custer; Theodora Oringer Miller & Richman and Todd C.  
Theodora for Defendant and Appellant.

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Plaintiff City of Anaheim (Anaheim) and Disney Baseball Enterprises, Inc. (Disney), entered into a stadium lease agreement in connection with Disney's purchase of the California Angels major league baseball team. Section 11(f) of the lease required Disney to change the team name "to include the name 'Anaheim' therein." Shortly after executing the lease, Disney renamed the team the "Anaheim Angels."

Seven years later, Disney sold the team to defendant Angels Baseball, L.P. (ABLP). In early 2005, ABLP changed the team's name to the "Los Angeles Angels of Anaheim." Anaheim sued, alleging the name change and ABLP's systematic removal of the name "Anaheim" from the team's road jerseys, tickets, merchandise, and souvenirs breached the team name provision of the lease and the implied covenant of good faith and fair dealing. After a lengthy trial, the jury rejected Anaheim's claims and returned a verdict in ABLP's favor.

Anaheim contends it was deprived of a fair trial because the trial court improperly (a) allowed Larry Murphy, the Disney official in charge of the negotiations with Anaheim, to testify about his subjective unexpressed intent concerning section 11(f) of the lease; (b) failed to give a number of jury instructions supporting Anaheim's theory of the case; (c) excluded the testimony of Anaheim's outside counsel regarding the meaning and intent behind various lease provisions; and (d) admitted the testimony of an undesignated expert witness.

In its separate appeal, ABLP challenges the trial court's order denying it prevailing party attorney fees under an indemnity provision in the lease. ABLP contends the doctrine of judicial estoppel bars Anaheim's assertion the lease provision did not authorize attorney fees because Anaheim earlier had taken the opposite position when it had successfully opposed ABLP's pretrial motion to strike Anaheim's attorney fee prayer in its complaint.

We conclude Anaheim has not met its burden of affirmatively demonstrating error and therefore no basis exists to overturn the jury's decision in this

case. The trial court did not err in allowing Murphy to testify that he sought maximum flexibility for Disney in drafting the team's name provision because Disney anticipated the need to add a second geographical designation to compensate for Anaheim's small market base. Murphy explained he pursued this strategy because flexible naming rights also would make it easier for Disney to attract potential buyers who would want the option of changing the team name. Murphy's testimony about his unexpressed intent became relevant when Anaheim introduced evidence no one from Disney contemplated two geographic designations in the team name. Accordingly, Murphy's testimony constituted admissible rebuttal evidence.

We also conclude the trial court did not err in rejecting Anaheim's special instructions. Specifically, Anaheim's special instruction No. 5 on unexpressed subjective intent incorrectly directed the jury not to consider ABLP's rebuttal evidence that Disney did not share the same unexpressed intent concerning the team naming provision. Anaheim's special instruction No. 1 unfairly favored Anaheim's evidence by specifically directing the jury to consider the custom and practice of Major League Baseball and was potentially confusing in its declaration that the lease was ambiguous. Anaheim's special instruction No. 3 was ambiguous because the instruction's reference to a "promise" failed to specify whether it referred to the promise forming section 11(f) or an unenforceable oral promise Disney made in the negotiations concerning the team name. The instruction also was misleading because it failed to inform the jury an objectively reasonable standard applied in evaluating the promisee's understanding of the agreement. Anaheim based its eighth special instruction on Civil Code section 1069, which requires interpreting a lease in favor of the public entity granting a leasehold to a private party. Civil Code section 1069 does not apply here, however, because Anaheim had no preexisting naming rights to the team. Rather, section 11(f)'s team name provision did not affect Anaheim's leasehold interest and merely formed part of the consideration for the agreement. The trial court also properly rejected Anaheim's special instruction

Nos. 4 and 12, and Anaheim's clarifying instruction to ABLP's special instruction No. 26, as either cumulative or argumentative.

We also discern no error in excluding the testimony of Anaheim's outside attorney because Anaheim failed to provide an adequate offer of proof. Finally, we reject Anaheim's contention the trial court erred in allowing the testimony of an undesignated expert witness. As we explain below, the witness did not testify as an expert.

Turning to ABLP's appeal, we conclude the trial court did not abuse its discretion in declining to apply the judicial estoppel doctrine, and that substantial evidence supports its finding the parties did not intend the lease's indemnification provision to cover prevailing party attorney fees. Accordingly, we affirm the judgment and the trial court order denying ABLP attorney fees.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

In 1960, Major League Baseball chartered a new American League team for Southern California and, until 1966, the team played under the name "Los Angeles Angels." In 1966, the team was renamed the "California Angels," and moved from Los Angeles to Anaheim. In 1996, Disney, on behalf of the Walt Disney Company, agreed to purchase the team from owner Gene Autry contingent on renegotiating the existing stadium lease with Anaheim. The existing lease was to expire in 2001.

Lease negotiations between Disney and Anaheim began in 1995, and continued into 1996. Murphy, Disney's executive vice president and chief strategic officer, negotiated for Disney. Although Murphy's face-to-face involvement was largely limited to the first third of the negotiations, Murphy lead the Disney negotiating team, and had oversight of the terms and conditions of the agreement. Also negotiating for Disney was Antonio Tavares, president of Disney Baseball Enterprises, who reported to Murphy. Sandy Litvack, Disney's general counsel and chief of corporate operations, also

conducted negotiations for Disney. Lowell Martindale of O'Melveny & Meyers provided Disney with legal representation.

Anaheim's negotiating team included James Ruth, city manager, David Morgan, assistant city manager, Gregory Smith, contract administrator, and William Sweeney, chief financial officer. Thomas Daly, Anaheim's mayor, also participated in the negotiations, and signed the lease on Anaheim's behalf. City Attorney Jack White and outside counsel Jill Draffin of McDermott Will & Emery handled Anaheim's legal representation.

Disney and Anaheim reached agreement and executed the Amended and Restated Lease Agreement on May 15, 1996. The lease required renovation of the stadium at an estimated cost of \$100 million, with Anaheim contributing \$20 million in cash and approximately \$10 million in revenues from outdoor advertising signs on the stadium premises. Disney assumed responsibility for the remainder of the renovation expenses.

The preexecution drafts of the proposed lease included a name provision in section 11(f), which provided: "Tenant will change the name of the Team to include the name 'Anaheim' therein, such change to be effective no later than the commencement of the 1997 Season." Late in the negotiations, Anaheim's representatives proposed the following change to section 11(f): "Tenant will change the name of the Team to 'Anaheim Angels' . . . ." Disney rejected this proposal, and the original wording of the provision remained in the final version.

The lease included a marketing provision, section 22(c), which provides: "Subject to the provisions of Sections 22(a) and 41(u), nothing in this lease is intended to or shall be deemed to require Tenant to adopt any marketing, licensing, sales, pricing or operating policies or procedures which Tenant, in its sole discretion, does not elect to adopt." The lease also included an integration clause, section 41(h), which provides, in

part: “This Lease shall constitute the entire agreement of the parties hereto with respect to the subject matter hereof.”

After purchasing the team, Disney promptly named the team the “Anaheim Angels.” In 2003, ABLP purchased the team for approximately \$180 million and began a marketing plan aimed at promoting the Angels as a “major market” team. As part of this effort, ABLP renamed the team the “Los Angeles Angels of Anaheim,” effective January 2005. Consistent with the new major market strategy, ABLP began eliminating “Anaheim” from team road jerseys, tickets, merchandise, and souvenirs.

Anaheim promptly filed suit against ABLP seeking injunctive and declaratory relief, and damages for breach of the lease and the implied covenant of good faith and fair dealing. Anaheim alleged the change in the team name from Anaheim Angels to Los Angeles Angels of Anaheim violated section 11(f) of the lease and the covenant of good faith and fair dealing because it deprived Anaheim of the national and international prominence it received from being the sole geographic identifier in the name of a major league baseball team. Anaheim also alleged ABLP’s systematic elimination of “Anaheim” from association with the team as part of ABLP’s marketing and branding plan violated section 11(f) and the covenant of good faith and fair dealing. Anaheim sought damages, injunctive and declaratory relief, and attorney fees “pursuant to Section 36(a) of the 1996 Lease Agreement.”

The trial court denied Anaheim’s request for a preliminary injunction seeking to require ABLP to change the team name back to the “Anaheim Angels” because Anaheim failed to demonstrate a reasonable likelihood of success on the merits. Anaheim filed a writ petition challenging the trial court’s ruling. We denied the petition in an unpublished decision, determining that substantial evidence supported the trial court’s action.

The case proceeded to trial, and the jury returned special verdicts finding ABLP did not breach section 11(f) of the lease, and did not breach the covenant of good

faith and fair dealing. The trial court then denied Anaheim's request for a permanent injunction, and denied ABLP's request for prevailing party attorney fees. Anaheim appeals the judgment, and ABLP appeals the trial court's order denying attorney fees.

## II

### STANDARD OF REVIEW

The law governing our review of Anaheim's appeal prohibits us from deciding how we would have resolved the factual issues raised at trial had we sat as the trier of fact. Our constitutional role as a reviewing court is not to substitute our view of the evidence for the jury's, but to determine whether Anaheim has carried its burden to demonstrate reversible error. "A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) "The burden of affirmatively demonstrating error is on the appellant. This is a general principle of appellate practice as well as an ingredient of the constitutional doctrine of reversible error." (*Fundamental Investment Etc. Realty Fund v. Gradow* (1994) 28 Cal.App.4th 966, 971.)

Anaheim challenges the trial court's admission of evidence on Disney's intent in negotiating section 11(f), and its exclusion of the testimony of Anaheim's attorney concerning aspects of the negotiations. We review these evidentiary rulings for abuse of discretion. (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 899.) The test for the abuse of discretion standard is whether the trial court's ruling "'exceeded the bounds of reason.'" (*Walker v. Superior Court* (1991) 53 Cal.3d 257, 272.) Even if the appellant presented a strong argument at trial for a ruling in its favor, we must reject the appellant's attack if the trial court's discretionary call did not stray beyond reasonable parameters. "'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'" [Citations.] In the absence of a clear

showing that its decision was arbitrary or irrational, a trial court should be presumed to have acted to achieve legitimate objectives and, accordingly, its discretionary determinations ought not [to] be set aside on review.” [Citation.]” (*Ajaxo Inc. v. E\*Trade Group, Inc.* (2005) 135 Cal.App.4th 21, 45.) We will not reverse a judgment based on the trial court’s improper admission or exclusion of evidence unless the error results in a miscarriage of justice. (*Travelers Casualty & Surety Co. v. Employers Ins. of Wausau* (2005) 130 Cal.App.4th 99, 117.) “In civil cases, a miscarriage of justice should be declared only when the reviewing court, after an examination of the entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.” (*Huffman v. Interstate Brands Corp.* (2004) 121 Cal.App.4th 679, 692.)

Anaheim also challenges the trial court’s refusal to give several of their special instructions. To prevail, the appellant must show the omitted instructions correctly state the applicable law. (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1534.) Even if the proposed instruction correctly states the law in the abstract, the trial court may reject the instruction if it is not supported by the evidence or is likely to mislead the jury. (*Joyce v. Simi Valley Unified School Dist.* (2003) 110 Cal.App.4th 292, 302.) “‘In a civil case, each of the parties must propose complete and comprehensive instructions in accordance with his theory of the litigation; if the parties do not do so, the court has no duty to instruct on its own motion.’ [Citations.] [Citation.] Neither a trial court nor a reviewing court in a civil action is obligated to seek out theories plaintiff might have advanced, or to articulate for him that which he has left unspoken.” (*Finn v. G. D. Searle & Co.* (1984) 35 Cal.3d 691, 701-702.)

“[T]here is no rule of automatic reversal or ‘inherent’ prejudice applicable to any category of civil instructional error, whether of commission or omission. A judgment may not be reversed for instructional error in a civil case ‘unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion

that the error complained of has resulted in a miscarriage of justice.’” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.) In making this determination, we must evaluate the state of the evidence, the effect of the other instructions, counsel’s arguments, and any jury questions. (*Id.* at pp. 580-581.) With these principles in mind, we begin our analysis.

### III

#### DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion in Allowing Murphy to Testify About His Unexpressed Intent*

At trial, Murphy testified that during lease negotiations, he intended for Disney to have maximum flexibility concerning the team name. He was particularly concerned that limiting the geographic identifier in the team name to only Anaheim might stymie the growth of the franchise because Anaheim was such a small market. Murphy anticipated a future need to incorporate an additional identifier, such as California, Orange County, or Los Angeles, in the team name. Murphy also anticipated that flexibility in the lease’s name provision would make it easier for Disney to attract potential buyers who would value the ability to change the team name. As Murphy explained, section 11(f) was intended to provide any future team buyer “as much flexibility as they could possibly have to put whatever name they wanted on the team.” Murphy testified he could not recall whether he specifically discussed the potential need for an additional geographic identifier with any of the Anaheim negotiators.

“California recognizes the objective theory of contracts [citation], under which ‘[i]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation’ [citation]. The parties’ undisclosed intent or understanding is irrelevant to contract interpretation.”

(*Founding Members of the Newport Beach Country Club v. Newport Beach Country*

*Club, Inc.* (2003) 109 Cal.App.4th 944, 956 (*Founding Members*).) Anaheim contends the trial court erred in allowing Murphy to testify regarding his undisclosed subjective intent that section 11(f) would reserve for Disney the right to add a second geographic identifier to the team name. In response, ABLP argues Anaheim placed the parties' subjective unexpressed intent in issue, opening the door to Murphy's rebuttal evidence. We agree with ABLP.

One of Anaheim's arguments at trial was that using two geographic identifiers in the team name was absurd, and something that no one, including Disney, contemplated at the time the parties executed the contract. For example, in its opening statement, Anaheim remarked: "Obviously no one at Disney and certainly no one at Anaheim ever thought there could ever be any possibility of Anaheim's chief rival being included in the name of the team." Later in its opening, Anaheim noted: "It's true Anaheim Angels may have been crossed out, but only for the limited purposes that everybody understood. And certainly not for a purpose that no one ever talked about, and *certainly wasn't contemplated by Disney, the purpose that you could put two home designations into a team name.*" (Italics added.)

Anaheim's first witness, Morgan, emphasized throughout his testimony the notion that no one ever thought about two geographic identifiers. Asked on direct examination about section 11(f)'s lack of specificity, Morgan responded: "It's because there would only be one home designation. There wouldn't be a sponsor. It would be Anaheim. And, you know, Anaheim was the home designation. We weren't going to compete with a sponsor. *And no one ever thought of two geographic identifiers. I mean, that's nonsense. . . .*" (Italics added.) Asked later on direct examination if he recalled discussions about custom and usage being changed to allow two geographic identifiers, Morgan responded, "That never was discussed. *I don't believe anybody even thought of that.*"

On redirect, when asked if the parties agreed to a variation of custom and usage, Morgan responded: “The city and Disney both agreed to accept a variation, a deviation from custom and practice on naming of professional teams in a very narrow fashion that the home designation could come after the team mascot. No one ever talked, *no one ever imagined two home designations.* [¶] One of the things that’s interesting about this case is that *both the original parties don’t dispute that. None of us even imagined this.*” (Italics added.) The trial court then granted ABLP’s motion to strike Morgan’s comment that “no one ever imagined” using two geographic identifiers. A short time later during his redirect, Anaheim asked Morgan to clarify a previous answer about Anaheim’s attempt to preclude two geographical identifiers by proposing to change section 11(f) to require the name “Anaheim Angels.” Morgan responded: “[W]hat’s important to understand is that’s not what . . . was asked for, because *no one anticipated, no one thought about two geographic identifiers.*” (Italics added.) This time, the trial court overruled ABLP’s motion to strike.

After Morgan’s redirect concluded, ABLP requested a brief recross solely to address the “no one thought of it” issue. The trial court refused to allow further questioning of the witness on this issue, noting, “if you bring additional evidence in that someone knew, then obviously his testimony was incorrect. But I’m not going to go over what everyone else knew with him.” Anaheim agreed with the court’s approach.

In addition to Morgan’s testimony, Anaheim elicited similar testimony from Tavares, as follows: “Q. [reading from declaration] ‘*Never did we contemplate that the team would include another geographic name in addition to Anaheim, as this would be inconsistent with the purpose of 11[f] to give Anaheim prominence and closely identify Anaheim with the team so that Anaheim would be publicized when the baseball team was publicized.*’ Is that a true statement? [¶] [A.] Yes. [¶] Q. Paragraph 13 on page 4 reads, ‘Given the importance of identifying Anaheim with the baseball team, it

*was never contemplated or suggested by anyone that there would be a second geographic name added to the team.’ Is that a true statement? [¶] [A.] Yes.” (Italics added.)*

Similarly, Anaheim asked Sandy Litvack, Disney’s chief of operations and general counsel the following: “Q. I take it then that nobody at Disney discussed having more than one geographic name in the name of the baseball team? [¶] A. Not with me. Absolutely not. [¶] Q. As far as you know, *nobody at Disney contemplated that possibility in 1996?* [¶] A. Not that I ever knew.” (Italics added.)

A party who inadvertently refers to an irrelevant matter does not automatically “open the gates” (*People v. Steele* (2002) 27 Cal.4th 1230, 1273 (*Steele*)) and allow an opponent to introduce irrelevant evidence on the same subject. (See *id.* at p. 1248 [“a party should not be allowed to take advantage of an obvious mistake to introduce prejudicial evidence”].) But when a party intentionally elicits irrelevant evidence that prejudices an opposing party, and an objection or motion to strike cannot cure the prejudice, the trial court has discretion to allow the opposing party to present evidence in rebuttal. (*Id.* at pp. 1248-1249; 3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 352, pp. 439-440.) The court’s discretion in whether to admit such rebuttal evidence is governed by “the doctrine of fair play.” (*Travis v. Southern Pacific Co.* (1962) 210 Cal.App.2d 410, 421. As *Steele* explains, the trial court “should strive to prevent unfairness to either side when one side presents evidence on a point, then tries to prevent the other side from responding.” (*Steele*, at p. 1248.)

Given Anaheim emphasized the issue twice during opening statement, and successfully elicited testimony from three key witnesses that no one had thought about the possibility of two geographic identifiers in the team name, we cannot conclude Anaheim introduced the issue by accident; indeed, the issue played a key role in Anaheim’s trial theme.<sup>1</sup> Moreover, Murphy’s rebuttal testimony addressed specifically

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<sup>1</sup> Anaheim abandoned this theme in its closing argument.

the issue Anaheim raised, and did not expand its scope. Under these circumstances, we cannot say the trial court's decision to admit Murphy's rebuttal testimony violated the doctrine of fair play.

During oral argument on its appeal, Anaheim asserted Murphy's testimony was not introduced as rebuttal evidence. How the parties described the evidentiary theory supporting Murphy's testimony is not determinative. The relevance of Murphy's account surfaced only after Anaheim had introduced the testimony of Morgan and Litvack that no one at Disney had thought of two geographic identifiers in the team name. Simply put, this constitutes rebuttal evidence. (See *Edgar v. Workmen's Comp. App. Bd.* (1966) 246 Cal.App.2d 660, 665 ["Rebuttal evidence is generally defined as evidence addressed to the evidence produced by the opposite party and does not include mere cumulative evidence of the plaintiff's case in chief"].)

*B. The Trial Court Did Not Err in Refusing Anaheim's Proposed Jury Instructions*

1. Anaheim's Special Instruction No. 5 Covering Unexpressed Subjective Intent

Anaheim contends the trial court compounded its error in allowing Murphy's testimony by refusing to give its special instruction No. 5, which provided: "Evidence of a person's subjective intent that was not expressed to the other party during negotiation of the Lease agreement cannot be considered in determining the meaning of Section 11(f) of the lease if that person's subjective unexpressed intent contradicts the other party's understanding of Section 11(f) of the lease."

Anaheim now asserts it was entitled to an instruction telling the jurors they could not consider the parties' unexpressed subjective intent in resolving the meaning of section 11(f). Anaheim's special instruction, however, does not recite that legal concept. Rather, the instruction proscribes consideration of the parties' subjective unexpressed intent *only if* such intent contradicts the other party's understanding. The instruction

therefore incorporates two legal principles. The first portion of the instruction, preceding the word “if,” correctly articulates the general rule that “[t]he parties’ undisclosed intent or understanding is irrelevant to contract interpretation.” (*Founding Members, supra*, 109 Cal.App.4th at p. 956.) The second portion of the instruction incorporates an exception to that general rule: One party may introduce evidence of an opponent’s unexpressed intent if it is consistent with the first party’s intent. (*Heston v. Farmers Ins. Group* (1984) 160 Cal.App.3d 402, 415 (*Heston*) [plaintiff allowed to introduce defendant’s brief filed in previous action that demonstrated defendant’s interpretation of a disputed contract term coincided with the plaintiff’s interpretation].)

Anaheim introduced testimony from Morgan, Tavares, and Litvack that no one at Disney had contemplated the use of two geographic identifiers in the team name before the lease was signed. Because evidence of Disney’s subjective mental processes supported Anaheim’s interpretation of section 11(f), it fell within the exception applied in *Heston* and, assuming *Heston* correctly stated the law, Anaheim would have been entitled to have the jury consider it. By the same token, however, the circumstances here, as discussed *post*, entitled ABLP to have the jury consider any contrary evidence ABLP offered in rebuttal.

Anaheim arguably would have been entitled to an instruction that the parties’ unexpressed subjective intent was irrelevant in determining the meaning of section 11(f) unless the jury found the parties shared the same unexpressed intent or understanding. While Anaheim’s proposed instruction authorized the jury to consider Anaheim’s evidence of a shared intent between it and Disney, the instruction erroneously directed the jury to disregard ABLP’s rebuttal evidence. The trial court therefore correctly rejected Anaheim’s special instruction.

During oral argument, Anaheim characterized its proposed instruction as a “limiting instruction.” It is axiomatic, however, that a limiting instruction should inform the jury of the limited purpose for which a particular piece of evidence may be

considered. Anaheim's instruction essentially told the jury that Murphy's testimony "cannot be considered in determining the meaning of section 11(f) of the lease . . . ." Because Anaheim did not request an instruction limiting the jury's consideration of Murphy's testimony to rebutting Anaheim's evidence of a shared mutual intent, the trial court was not required to give such an instruction. (See *Barajas v. USA Petroleum Corp.* (1986) 184 Cal.App.3d 974, 990 [trial court has no sua sponte duty to give limiting instructions].)

2. Anaheim's Special Instruction No. 1 on Section 11(f)'s Ambiguity

Anaheim's special instruction No. 1 provided: "The Court has determined that Section 11(f) of the lease is ambiguous. In interpreting Section 11(f) of the lease, you may consider things that are not written in the lease. Among other things, you may consider evidence of the intent of the parties to the lease, the custom and usage concerning names of major league baseball teams, and the subsequent conduct of the parties to the lease." The trial court rejected the proffered instruction as a misleading statement of the law. We agree with the trial court.

As Anaheim concedes, the trial court properly instructed the jury it could consider evidence of the parties' intent, custom and usage, and the parties' subsequent conduct. In that sense, the proffered instruction is merely cumulative of the court's other instructions. This reason alone adequately supports the trial court's rejection of the instruction. Anaheim's proposed instruction, however, adds two additional improper elements to the mix.

First, the instruction's reference to custom and usage specifically mentions major league baseball. True, the Angels are part of major league baseball, but they are also part of the larger group that comprises all of professional baseball. Although a team name incorporating two geographic identifiers did not fit the custom and usage of major league baseball, Anaheim's expert conceded it fit "well within custom and usage" of

minor league baseball, which is a part of professional baseball. By singling out major league baseball, the instruction unfairly favors Anaheim's evidence. (*Estate of Mann* (1986) 184 Cal.App.3d 593, 611 (*Mann*) ["instructions should avoid 'singling out and bringing into prominence before the jury certain isolated facts and thereby, in effect, intimating to the jury that special consideration should be given to those facts'"].)

Second, the instruction includes an irrelevant, potentially misleading judicial declaration that section 11(f) is ambiguous. ““An ambiguity arises when language is reasonably susceptible of more than one application to material facts. There cannot be an ambiguity per se, i.e., an ambiguity unrelated to an application.”” (*Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 391.) The question whether a contract term is reasonably susceptible to more than one meaning is a question of law for the court. (*Founding Members, supra*, 109 Cal.App.4th at p. 955.) The court undertakes “a preliminary consideration of all credible evidence offered to prove the intention of the parties. [Fn. omitted.] [Citations.] . . . [Citations.] If the court decides, after considering this evidence, that the language of a contract, in the light of all the circumstances, ‘is fairly susceptible of either one of the two interpretations contended for . . .’ [citations], extrinsic evidence relevant to prove either of such meanings is admissible. [Fn. omitted.]” (*Pacific Gas & E. Co. v. G. W. Thomas Drayage Etc. Co.* (1968) 69 Cal.2d 33, 39-40.)

Because the jury has no role in the foregoing process, telling jurors a contract is ambiguous does nothing to assist them in performing their task, and may cause them to improperly disregard the contract terms entirely. Anaheim cites no authority requiring a trial court to inform the jury a contract is ambiguous, and we are unaware of any such requirement. Consequently, we discern no error in the trial court's refusal to give Anaheim's special instruction No. 1.

### 3. Anaheim's Clarifying Instruction on Integrated Agreements

The trial court gave ABLP's special instruction No. 26, defining an integrated agreement, which provided: "Terms set forth in a writing intended by the parties as the final expression of their agreement with respect to such terms as are included may not be contradicted by evidence of any prior oral agreement or contemporaneous oral agreement." Anaheim does not take issue with this instruction, but contends the trial court erred by failing to give Anaheim's clarifying instruction: "Evidence of a prior or contemporaneous oral agreement that does not contradict the final written agreement may be considered to interpret ambiguous terms in the final written agreement as expressions of the parties' intent."

We conclude the trial court did not err in refusing Anaheim's proposed clarifying instruction for two reasons. First, it was unnecessary because the gist of Anaheim's instruction is implied as the negative pregnant of the integration instruction given, and is otherwise covered by the court's general instruction that the jury "may consider . . . the circumstances surrounding the making of the contract." Second, by highlighting the parties' oral agreements, the requested clarification suggests the jury must give them special prominence among the various circumstances surrounding the execution of the lease. As noted above, jury instructions should avoid singling out facts supporting one side's case because it may influence the jury to give those facts special prominence. (See *Mann, supra*, 184 Cal.App.3d at p. 611[.] ) Moreover, specifically instructing the jury to consider oral agreements might have misled the jurors into incorporating the parties' oral agreements into the ambiguous lease term. As we discuss *post*, ABLP agreed to be bound by the written terms of the lease, not any oral agreements between Disney and Anaheim.

4. Anaheim's Special Instruction No. 3, Based on Civil Code Section 1649

(a) The Proposed Instruction Is Ambiguous

Civil Code section 1649 provides: "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." Based on this statute, Anaheim proposed special instruction No. 3, which read: "The terms of Section 11(f) of the lease must be interpreted based on the promisor's (Disney) belief of how the promisee (the City) understood the promise at the time the promise was made." Anaheim contends the trial court erred in refusing to give the instruction because it tracked Civil Code section 1649. We disagree.

The flaw in Anaheim's instruction becomes apparent when considered in context. During lease negotiations Disney and Anaheim shared the common goal of promoting Anaheim as a tourist and convention destination. Increased tourism to Anaheim benefitted not only the city, but also meant an increase in potential customers for Disneyland, Disney's proposed "second gate" (i.e., California Adventure), and Disney's Mighty Ducks hockey team. Disney's willingness to promote Anaheim was evident in its decision to name the team the "Anaheim Angels," include the city's name on its road jerseys, and imprint an Anaheim logo on the Angels' team items, even though not expressly required by the lease.

The evidence demonstrated, however, Disney had another goal, not shared by Anaheim, to ensure flexibility in the team name as an inducement to a potential future purchaser of the team and thereby achieve maximum return from the sale. On this subject, Murphy testified: "[U]ltimately we didn't know how things were going to work out. In any deal you try to have an exit strategy. We had to at least know that the team would be a fungible asset, saleable to a third party at some point. And we felt that any future owner would want the flexibility — as much flexibility as they could possibly have

to put whatever name they wanted on the team.” Ruth similarly testified: “My understanding was that they [Disney] needed more flexibility because . . . they had not agreed on a final name yet, and he wasn’t sure whether it was going to be the Anaheim Angels, the Angels of Anaheim, *and they wanted flexibility to eventually if they decided to sell the team to the new owner, a new proposer might want to change the mascot.* That was my understanding.” (Italics added.)

Disney’s goal of promoting Anaheim as a tourist destination provided Disney an incentive to orally promise Anaheim prominence in the team name, but Disney’s goal of flexibility for a new team owner provided Disney an incentive to exclude the promise from the written lease. In other words, Disney had an incentive to promise and deliver to Anaheim more than it was willing to “hardwire” into the lease. The tension between what Disney promised to give Anaheim and what it was willing to put in the contract is evident in the testimony of Anaheim’s mayor, Tom Daly, and Anaheim’s City Manager, James Ruth.

During his videotaped deposition, which was played to the jury, Daly testified he was “generally cognizant” of rare situations in professional sports where teams used two geographic identifiers, and it was “one of the considerations” in mind when he discussed the issue with Sandy Litvack. Daly testified, “I recall asking Mr. Litva[c]k in particular for his assurances that ‘Anaheim’ would be included in the team name as the only geographic reference, and I recall asking whether he could — he was speaking for the company on the subject. [¶] And he said yes to both questions.” Daly testified he therefore believed there was “‘an agreement with Disney that “Anaheim” would be included in the team name as the only geographic reference in the team name[.]’” At trial, ABLP read Daly’s deposition testimony that he believed there was an agreement with Disney that Anaheim would be the only geographic reference in the team name. When asked if this testimony was correct, Daly answered: “Yes. I stand by that.”

Anaheim's city manager, James Ruth, testified in essence that the lease required Disney to name the team "Anaheim Angels" despite undisputed evidence Disney rejected Anaheim's proposed express language in section 11(f) to that effect. Specifically, Ruth testified: "Q. Based on your understanding of the contract, is Mighty Angels of Anaheim an acceptable name? [¶] A. In my opinion, no. [¶] Q. Why not? A. Because that's not what we agreed to. [¶] Q. Okay. And when you say 'not what you agreed to,' you mean you and Tony Tavares? A. That's correct."

Ruth explained he dropped his insistence on an express provision in section 11(f) limiting the team name to Anaheim Angels because of an oral promise from Disney, as follows: "Q. If you chose, you could have caused your attorneys to provide more specific language with respect to what you agreed to in paragraph 11(f); correct? [¶] A. That's possible. [¶] Q. And is it your testimony that you made a choice not to do that? A. I made a choice based on integrity when somebody says we have a deal and we agree to the interpretation of the intent behind that statement, and we shake hands on it, or we agree to it verbally, that's integrity, and I think Tony — I knew exactly what his intent was, and he knew what my intent was, and we both agreed to that. [¶] I've got to give him the flexibility he needs to make it happen."

Ruth later testified that, at most under the lease, Disney could reverse the placement of the mascot and city in the team name, or change the name of the mascot altogether. But Ruth acknowledged he did not instruct his attorneys to change the lease to reflect this limitation, as follows: "[You] could have added the words to — changed the name of the team to the Anaheim Angels or Angels of Anaheim or changed the mascot, could have done that, but you did not do that because you knew that Disney would not sign the contract with those words in it; yes? True? [¶] A. Yes to that."

A fair reading of Ruth's testimony suggests the parties did not memorialize agreed upon specific limitations to the team name because (a) Disney demanded maximum flexibility in the written lease's name provision, and (b) Anaheim accepted

Disney’s oral promise it would limit the team name to certain variations. But ABLP, as Disney’s successor to the lease, is not bound by Disney’s oral promises to Anaheim, but only by the lease’s written terms. In light of Daly’s and Ruth’s testimony that Disney made an oral promise, the proposed instruction is confusing and potentially misleading.

Specifically, the proposed instruction read: “The terms of Section 11(f) of the lease must be interpreted based on the promisor’s (Disney) belief of how the promisee (the City) understood the promise at the time the promise was made.” The special instruction fails to inform jurors the “promise” refers to “Section 11(f)” and not to any separate and unenforceable oral promises Disney made to Daly and Ruth. There is little place for elegant variation<sup>2</sup> in jury instructions, and the instruction’s use of two different terms, “Section 11(f)” and “promise,” in the same sentence suggests they carry different meanings.<sup>3</sup>

Anaheim could have avoided this particular problem with the instruction by using more precise language, illustrated in the following example: “The terms of Section 11(f) of the lease must be interpreted based on Disney’s belief of how Anaheim understood these terms at the time the lease was executed.” This would focus the jury on the parties’ understanding of the written lease terms, and not on verbal promises made

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<sup>2</sup> Henry Watson Fowler coined the phrase “elegant variation” to refer to the unnecessary use of synonyms when referring to the same thing. In *Modern English Usage* (1926), Fowler warned writers not to adopt stylistic notions “based on a few misleading rules of thumb, that are chiefly open to the allurements of elegant variation. . . . The fatal influence . . . is the advice given to young writers never to use the same word twice in a sentence — or within 20 lines or other limit.”

<sup>3</sup> Indeed, the instruction’s use of the undefined term “the promise” apparently confused the trial judge, who observed: “I’m uncertain about this because whose promise it is. Is it a promise by Angels that we’re going to limit our name to things with Anaheim in it, or is it a promise by the City that you can name it whatever you want, as long as you put Anaheim in it? So whose promise is it?”

during lease negotiations. Anaheim’s proposed instruction failed to avoid this ambiguity.<sup>4</sup>

(b) The Proposed Instruction Fails to Inform the Jury an Objectively Reasonable Standard Applies

Even if Anaheim had avoided the ambiguity above, however, the instruction would have been incomplete, despite accurately tracking the language of Civil Code section 1649. ““An instruction in the language of a statute is proper only if the jury would have no difficulty in understanding the statute without guidance from the court. [Citations.] . . . [Citation.]”” (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1004 (*Torres*)).

For example, in *Torres*, the plaintiff sought to invoke the exception to workers’ compensation exclusivity in Labor Code section 3601, subdivision (a)(1), “[w]hen the injury or death is proximately caused by the willful and unprovoked physical act of aggression of the other employee.” The trial court instructed the jury that for the plaintiff to recover, they had to find (1) the plaintiff’s “injury was caused by a willful and unprovoked physical act of aggression on the part of [the coworker],” and (2) [the coworker] “committed the act with the intent to cause injury.” (*Torres, supra*, 26 Cal.4th at p. 1000.) The California Supreme Court rejected the plaintiff’s claim the trial court erred in adding to the instruction an “intent to cause injury” requirement not found in the words of the statute. The Supreme Court concluded the trial court’s jury instruction

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<sup>4</sup> The dissent claims “there was no reasonable ambiguity over what ‘the promise’ was, because the proposed jury instruction *began* by telling the jury that they were interpreting section 11(f).” (Dissent at p. 7.) We agree the instruction was clear about *what* the jury was to interpret. But the instruction was unclear about *how* the jury was to accomplish its task. The dissent simply assumes the jury would intuitively know “the promise” referred exclusively to the terms of section 11(f) itself, and not to Disney’s unenforceable oral promise discussed above. We decline to join the dissent’s unsupported leap of faith.

properly added to the statutory language the additional requirement of an intent to cause injury because this was implicit in the language of the statute. (*Id.* at pp. 1005-1006.)

Merely restating Civil Code section 1649 as a jury instruction may lead to error. For example, in *Wolf v. Superior Court* (2004) 114 Cal.App.4th 1343, the promisor argued Civil Code section 1649 required the court to interpret a contract term in accord with its own subjective belief of how the promisee understood it. Although the literal language of Civil Code section 1649 would have required interpretation in this manner, the appellate court in *Wolf* rejected this argument, noting the section was designed “to protect the promisee’s *objectively reasonable* expectations.” (*Wolf*, at p. 1357, fn. 18, italics added.) Despite the lack of evidence concerning the contract negotiations, the appellate court overturned summary adjudication for the promisor because expert testimony of custom and usage created a triable issue of fact regarding the parties’ “objectively reasonable expectations regarding the scope of the term when they agreed to the contract . . . .” (*Id.* at p. 1360.)

The California Supreme Court recognized this requirement in the insurance context, observing that Section 1649 protects “‘the objectively reasonable expectations of the insured.’” (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1265.) Similarly, in *Medical Operations Management, Inc. v. National Health Laboratories, Inc.* (1986) 176 Cal.App.3d 886, 893, the court recognized the task under Civil Code section 1649 was to “determine consistent with the ‘objective’ standard of contract interpretation [citations] how a reasonable promisor in [the promisor’s] shoes would have believed [the promisee] understood [the promisor’s] responsibilities under” the disputed term.

That a party may not rely on its own objectively unreasonable understanding of a contract term, even if communicated to the other party, is recognized in the Restatement, Second of Contracts, section 201(2), which provides: “Where the parties have attached different meanings to a promise or agreement or a term thereof, it is

interpreted in accordance with the meaning attached by one of them if at the time the agreement was made [¶] (a) *that party did not know of any different meaning attached by the other*, and the other knew the meaning attached by the first party; or [¶] (b) *that party had no reason to know of any different meaning attached by the other*, and the other had reason to know the meaning attached by the first party.” (Italics added.) In other words, a party cannot rely on its own understanding of a contract term where that party knew or had reason to know the other side repudiated that understanding before signing the contract.

As noted above, Ruth testified he understood, based on an oral agreement with Disney, that section 11(f) required Disney to name the team “Anaheim Angels.” Given the undisputed fact that Disney rejected express language in section 11(f) naming the team the “Anaheim Angels” before the contract was signed, the jury could reasonably conclude Ruth’s understanding of the contract term was objectively unreasonable. As written, however, the proffered instruction would erroneously *require* the jury to interpret section 11(f) in accord with Ruth’s understanding. Instead of protecting the parties’ objectively reasonable expectations at the time they entered into the lease, a jury instruction consisting of the bare language of section 1649 would defeat it.

It is unclear why the trial court rejected the special instruction. But ABLP objected to it in part because the instruction failed to articulate the “objective[ly] reasonable belief” standard. Anaheim responded to this objection by asserting the instruction was “right out of the Civil Code . . . .” Although a jury instruction simply reciting Civil Code section 1649 may be appropriate in situations where no evidence had been presented demonstrating the promisee’s understanding had been repudiated or was otherwise unreasonable, the requested instruction here was incomplete for failing to inform the jury it must determine whether Anaheim’s understanding of section 11(f) was

objectively reasonable.<sup>5</sup> The law imposes no duty on the trial court to correct or rewrite a party's confusing or incomplete proposed instruction. (See *Bullock v. Philip Morris USA, Inc.* (2008) 159 Cal.App.4th 655, 694.) Accordingly, we conclude the trial court did not err in refusing to give Anaheim's special instruction No. 3.

The dissent mistakenly transposes principles governing the implied covenant of good faith and fair dealing to the separate concept of contract interpretation under Civil Code section 1649. In doing so, the dissent disregards any issue regarding the objective reasonableness of Anaheim's understanding, and focuses on the purported unreasonableness of ABLP's interpretation of section 11(f). In its apples to oranges comparison, the dissent goes so far as to suggest that our opinion, if published, "would do great violence to the law of bad faith." (At p. 10, *post.*) Not so. We emphasize the issue of the covenant of good faith and fair dealing presents a separate issue from Civil Code section 1649, one that Anaheim did not raise in its appeal.

Even assuming the relevance of the issue, however, the dissent fails to demonstrate error. Citing *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 806, the dissent states the principle underlying the covenant of good faith and fair dealing: "When a contract provides that one party has discretion in performing a term of a contract, the law requires that party to use its discretion in good faith, and not in such a way as to deprive the other party of *its* benefits under the contract." (At pp. 7-8, *post.*) According to the dissent, the covenant would prevent ABLP from depriving Anaheim of a bargained-for benefit under the lease, even if ABLP did not breach the lease's express terms.

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<sup>5</sup> We recognize the heading on Anaheim's proposed instruction read "Promisee's Objectively Reasonable Expectations." But the trial court reads only the instructions to the jury, not the headings. Even if the jury received the written instruction containing the heading, the instruction fails to inform the jury it must find the promisee's expectations were objectively reasonable.

But the trial court fully and properly instructed on this issue, which undoubtedly explains why Anaheim did not raise the issue on appeal. The trial court gave the following instruction: “In every contract or agreement there is an implied promise of good faith and fair dealing. This means that each party will not do anything to unfairly interfere with the right of any other party to receive the benefits of the contract; however, the implied promise of good faith and fair dealing cannot create obligations that are inconsistent with the terms the contract. [¶] City of Anaheim claims that Angels Baseball, L.P. violated the duty to act fairly and in good faith. To establish this claim, City of Anaheim must prove the following two elements that are at dispute in this case: [¶] 1. That Angels Baseball, L.P. unfairly interfered with City of Anaheim’s right to receive the benefits of the contract; and [¶] 2. That City of Anaheim was harmed by Angels Baseball, L.P.’s conduct, as I otherwise instruct you.”

Significantly, the trial court followed up: “A party breaches the implied covenant of good faith and fair dealing if it subjectively lacks belief in the validity of its acts or *its conduct is objectively unreasonable*.” (Italics added.) Anaheim does not complain about either of these two instructions. In sum, the court gave the jury complete and accurate instructions on the implied covenant of good faith and fair dealing. The reality is the jury rejected Anaheim’s argument that ABLP’s conduct was objectively unreasonable and breached the implied covenant. No legal basis therefore exists to overturn the jury’s decision on this issue.

5. Anaheim’s Special Instruction No. 4 on the Relevance of the Parties’ Precontract Discussions

Anaheim submitted two versions of special instruction No. 4. The first read: “Statements made by the parties (Disney and the City) to each other during negotiations are relevant in determining the parties’ understanding of Section 11(f) of the lease.” Anaheim also submitted a revised special instruction No. 4, which provides:

“Statements made by the parties to each other during negotiations can be considered in determining the parties’ intent.

Anaheim contends its special instruction is necessary to counter ABLP’s reliance on the lease’s integration agreement. We disagree. The trial court instructed the jury they “may consider . . . the circumstances surrounding the making of the contract” in interpreting the lease. Certainly, the discussions and negotiations between the parties are part of these circumstances. Because the instruction given by the court adequately covered the subject, we conclude the trial court did not err in failing to give either version of special instruction No. 4. (See *People v. Hovarter* (2008) 44 Cal.4th 983, 1022.)

6. Anaheim’s Special Instruction No. 12, on Specific Provisions Controlling a General Provision

Anaheim’s special instruction No. 12 provided: “Contracts must be interpreted in a manner that gives force and effect to every provision, and not in a way which renders some clauses meaningless. When specific and general provisions of an agreement are inconsistent, the specific provision controls the general one.” Anaheim contends the trial court’s failure to give its requested instruction prevented it from arguing that section 11(f) was more specific than the marketing provision of section 22(c), and therefore must control.

We perceive no inconsistency between sections 11(f) and 22(c) justifying use of the requested instruction. Moreover, as the trial court noted, it is unclear which provision is more specific, as they cover different subjects. To the extent the evidence allowed Anaheim to argue section 11(f) limits the discretion conferred on the lessee in section 22(c), CACI No. 317 adequately addressed the issue, which, as read to the jury, provides: “In deciding what the words of a contract meant to the parties, you should consider the whole contract, not just isolated parts. You should use each part to help you interpret the others, so that all the parts make sense when taken together.”

7. Anaheim's Special Instruction No. 8, Based on Civil Code Section 1069

Anaheim's proposed special instruction No. 8 read: "Every grant by a public body to a private party is to be interpreted in favor of the grantor. A lease is a 'grant.'" Anaheim contends the trial court erred in failing to give this instruction because the section "*requires* interpretation in favor of the public entity even if there were substantial evidence to support ABLP's interpretation." (Original italics.) Anaheim contends the section "therefore mandates that judgment be entered that ABLP breached Section 11(f) and the covenant of good faith and fair dealing." We disagree.

As a general rule, "[a]ll contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this Code." (Civ. Code, § 1635.) One exception to this general rule is found in Civil Code section 1069, which provides: "A grant is to be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor."

Anaheim's proffered instruction incorporates Civil Code 1069, but includes the statement: "A lease is a grant." Implicit in this statement and underlying Anaheim's argument is the assumption that every term in a lease agreement is a "grant." But the authority Anaheim cites for this proposition does not support it. Specifically, *Upton v. Tosh* (1940) 36 Cal.App.2d 679, 686, recognized that Civil Code section 1069 applied to the termination clause in a lease because the clause constituted a reservation in the interest granted. Nothing in *Upton* suggested Civil Code section 1069 would apply to every term of a lease with a public agency.

Anaheim also cites *Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333 (*Red Mountain*). In *Red Mountain*, the court considered an agreement calling for a government entity to grant an easement to a private party. The court recognized Civil Code section 1069 did not apply to all of the contract terms, but used the statute to construe an ambiguous clause in the public entity's favor "because the

ambiguity concerns the nature and scope of the easement to be granted.” (*Red Mountain, supra*, 143 Cal.App.4th at p. 345.) In reaching this conclusion, the *Red Mountain* court considered Civil Code section 1069’s historical background explained by the California Supreme Court in *Los Angeles v. San Pedro etc. R. R. Co.* (1920) 182 Cal. 652, 655 (*San Pedro*): “““All grants of the Crown are to be strictly construed against the grantee, contrary to the usual policy of the law in the consideration of grants; and upon this just ground, that the prerogatives and rights and emoluments of the Crown being conferred upon it for great purposes, and for the public use, it shall not be intended that such prerogatives, rights and emoluments are diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away.”””

In the present case, section 11(f) does not purport to diminish any of Anaheim’s “prerogatives, rights and emoluments” because Anaheim had no preexisting naming rights to the team name. That section 11(f) may be construed to grant a limited right *to* Anaheim does not change the analysis; the exception in Civil Code section 1069 applies only to a “grant *by* a public officer or body . . . .” (*Italics added.*) Section 11(f) does not affect the scope of Anaheim’s grant of a leasehold interest, but merely recites a portion of the consideration Disney agreed to give in return for Anaheim’s grant.

The distinction between a public entity’s grant and return performance by the grantee is illustrated in *Stockton v. Stockton Plaza Corp.* (1968) 261 Cal.App.2d 639, 646. There, a city leased certain property to a developer, who agreed to construct specified improvements on the land if the developer could secure suitable financing. The developer failed to obtain the required financing and after several years the city sued to terminate the lease. Recognizing no clause in the lease expressly allowed the city to terminate, the court turned to the various rules of statutory construction to determine whether the contract implicitly required the contractor to obtain financing within a reasonable time. In deciding which statutory contract interpretation rules to apply, the court rejected the suggestion the city’s status as a public entity might alter the analysis,

noting: “Civil Code section 1635 directs that ‘All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this code.’ We find no exception applicable here.” (*Id.* at p. 646.)

The present case is indistinguishable from *Stockton*. The clause in the *Stockton* lease requiring the developer to construct improvements upon the leased land did not constitute a grant by the city, but merely specified the developer’s consideration for the lease grant. Here, section 11(f) merely describes part of the consideration Disney paid for the Anaheim’s grant of the leased stadium premises. Because section 11(f) does not affect the nature or scope of that grant, Civil Code section 1069 is inapplicable. Thus, section 11(f) is subject to the same rules of contract interpretation as any other contract, as expressly required by Civil Code section 1635.

In disagreeing with our conclusion, the dissent misconstrues our analysis. We do not, as the dissent suggests, purport to limit application of Civil Code section 1069 only to those clauses in a public contract that describe the *physical* scope of the grant. Civil Code section 1069 applies to all dimensions of a public grant, including physical, temporal, and legal rights conveyed. The two cases the dissent cites are consistent with this conclusion.

In *County of L. A. v. Southern Cal. Tel. Co.* (1948) 32 Cal.2d 378, 384 (*County of L.A.*), the court considered whether granting a franchise under former Civil Code section 536 to telephone corporations to use public roads and highways constituted an unconstitutional gift of public funds. Upholding the validity of the statute, the court reasoned: “The franchise is conditioned not only on the establishment of lines by a telegraph or telephone corporation, but also, by necessary implication, on the continued operation of the system. The grant under section 536 must be construed in favor of the state. (Civ. Code, § 1069.) As so construed it must be held to be a grant to use public roads and highways *so long as* telegraph or telephone communication service is continued and that the acceptance of the franchise involves an assumption of the duty to

furnish proper and adequate communication service to the public.” (*County of L.A.*, at p. 384, italics added.) The court’s use of the phrase “so long as” indicates the ongoing delivery of telephone service acted as a limitation on the temporal scope of the grant. That this limitation also involved consideration for the grant does not remove it from the scope of Civil Code section 1069.

In contrast to the franchise in *County of L. A.*, ABLP’s rights to use the stadium are not enlarged or diminished based on how one interprets section 11(f). Had the lease included a provision, for example, that ABLP could use the stadium “so long as the Angels have a winning record,” Civil Code section 1069 would apply because the scope of Anaheim’s grant would depend upon whether the term “winning record” referred to the current season, the previous season, or the team’s complete history.

In *Southern California Gas Co. v. City of Los Angeles* (1958) 50 Cal.2d 713 (*Southern California Gas*), the other case the dissent relies upon, the court considered whether a city could require a utility to relocate gas lines at its own expense to make way for the construction of a sewer. The court applied Civil Code section 1069 and determined the franchise allowing placement of the gas lines did not implicitly abrogate the common law rule that a utility must relocate its facilities at its own expense when necessary to make way for a proper governmental use of public streets. In doing so, the court recognized “the paramount right of the people as a whole to use the public streets wherever located . . . .” (*Southern California Gas*, at p. 717.)

In an effort to shoehorn *Southern California Gas* into its own analysis, the dissent refers to the city’s superior rights to public roadways as “implied relocation cost terms which would be part of the consideration given by the private entity.” (At p. 6, *post.*) But *Southern California Gas* did not purport to construe any provision in the franchise dealing with consideration; it unmistakably construed the *legal scope* of the grant, i.e., whether the franchise granted the utility common law legal rights held by the municipality to use the roads for a public purpose. Again, in the present case, the legal

rights Anaheim granted ABLP under the lease are not enlarged or diminished based on how section 11(f) is interpreted.

The dissent ends by noting that “[i]t is contrary to . . . common sense, to assume that what the public entity *gave* in terms of land is covered by section 1069, but what it *got*, under the very same contract, is not.” (At p. 6, *post.*) We disagree.

Applying Civil Code section 1069 only to what Anaheim *gave* in terms of land is consistent with both the statute’s express terms, which applies only to a “grant *by* a public officer or body” (Civ. Code, § 1069, italics added), and its purpose, which is to prevent a government’s “prerogatives, rights and emoluments [from being] diminished by any grant, beyond what such grant by necessary and unavoidable construction shall take away.” (*San Pedro, supra*, 182 Cal. at p. 655.) Because Civil Code section 1069 does not apply to the interpretation of section 11(f), the trial court did not err in rejecting Anaheim’s special instruction.

C. *The Trial Court Did Not Abuse Its Discretion in Excluding Draffin’s Testimony*

Anaheim included on its witness list one of its outside attorneys, Draffin, who helped draft the lease. During her pretrial deposition, Draffin asserted the attorney-client privilege to several questions, and Anaheim did not offer to waive the privilege at trial. The day before Draffin’s scheduled testimony, the trial court expressed concerns her testimony may involve matters falling within the attorney-client privilege, and requested an offer of proof. The next day, Anaheim made an offer of proof regarding Draffin’s proposed testimony. Following the offer, the trial court excluded her testimony in its entirety. The court found the testimony cumulative, would cause an undue consumption of time, and its prejudicial effect outweighed its probative value. The court also noted the proposed testimony was based on speculation, hearsay, and attorney-client communications. The court similarly excluded the testimony of Disney’s outside counsel in connection with lease negotiations, Lowell Martindale.

Anaheim contends Draffin would have provided critical and unique testimony regarding sections 11(f) and 22(c) of the lease, and the trial's court's refusal to allow Draffin to testify requires reversal. We disagree.

Evidence Code section 354 provides: "A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that: [¶] (a) *The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means*; [¶] (b) The rulings of the court made compliance with subdivision (a) futile; or [¶] (c) The evidence was sought by questions asked during cross-examination or recross-examination." (Italics added.)

The statutory offer of proof requirements allow the trial court to fully assess the proffered testimony and "provide[s] the reviewing court with the means of determining error and assessing prejudice." (*People v. Schmies* (1996) 44 Cal.App.4th 38, 53.) "[A]n offer of proof must be specific. It must set forth the actual evidence to be produced and not merely the facts or issues to be addressed and argued." (*Ibid.*) In reviewing the trial court's ruling, we therefore start with Anaheim's offer of proof.

With respect to Draffin's testimony on section 11(f), Anaheim made the following offer: "She'll talk about 11(f), of course. And she'll talk about what was discussed with Disney attorneys relating to 11(f) and what was discussed with city and Disney people relating to 11(f) and how with those discussions and based upon that the language was chosen and used. That's in 11(f). [¶] She will talk about discussions that occurred relating to custom and practice between Disney and the city and how that affected the language in 11(f). [¶] She will talk about the phrase 'team name' and how that affects the way 11(f) is viewed. [¶] She will talk about the three tools that Mr. Guilford related to; that is, how the intent of the parties as expressed in the

discussions she heard between Disney and city was incorporated into 11(f); how the custom and practice pursuant to the discussions was incorporated into 11(f), and how this was ultimately implemented by the conduct of the parties. [¶] . . . [¶] She will testify to why — she will testify to the language that’s been put on a poster board here that was proposed that 11(f) read, the name of the team will be Anaheim Angels. And she will discuss what the response was to that request, what was told to her, and what the purpose of that was and why it was acceptable to just go back to the prior language.”

The foregoing offer of proof is manifestly insufficient. The offer fails to set forth any of the specific testimony from Draffin, referring only to subjects she would address. For example, the offer indicated Draffin would testify about discussions with Disney relating to custom and usage, but failed not only to relate the substance of those discussions, but did not even summarize their content. Indeed, the offer fails to indicate whether Draffin’s testimony on the subjects mentioned would favor Anaheim. Because the offer of proof regarding Draffin’s testimony concerning section 11(f) is so clearly insufficient under Evidence Code section 354, we cannot determine whether the trial court’s exclusion of Draffin’s testimony would require reversal.

Anaheim’s offer of proof on Draffin’s testimony regarding section 22(c) was more extensive than its offer of proof on 11(f), but the overwhelming majority of it consisted of argument by Anaheim’s counsel. Those portions of the offer purporting to summarize Draffin’s testimony, excluding counsel’s argument, include the following: “She will testify, your honor, regarding 22(c), and regarding the language that has been much discussed by Angels Baseball in their questioning. And she will testify that 22(c) was discussed with Disney’s attorneys. And the discussion with Disney’s attorneys was not that the team would have discretion to act with disregard to the covenants of the lease. . . . [¶] . . . [¶] She will talk about the discussions that she had with Disney attorneys regarding why 22(c) was in the lease. She will indicate that the purpose, instead of eliminating the covenants of the lease, was to protect Disney from having to

adopt policies and procedures in the future that they had not agreed to in the lease which would be foisted upon them by the city or by some implication; and that among those policies and procedures that Disney was concerned about was a provision in the lease that says that if there's any [preferred] seat licenses, P.S.L.'s — and that's basically a — something that's sold to a season ticket holder so that in future years, their season — their seat will not be given to somebody else. And it's used as a revenue-creating device in some stadiums. Otherwise, there is potentially a right to lose your seats, even though you've paid your — for your season seats. There's no guarantee in the future, and a personal seat license would guarantee you the right to this seat for 'X' number of years in the future. [¶] And there was a provision that was put in the lease if the team sells personal seat licenses, that Disney would get — that the city would get 20 percent of the income. [¶] Disney was concerned about putting that in and thought that that might create an implication that they might have to adopt a personal seat license policy in the future. [¶] . . . [¶] Another example that she will say was discussed with Disney attorneys, a concern, was there's *[sic]* a requirement under the lease that the team and the city tried to harmonize the operations of the stadium and the parking lot with the Sportstown development that was contemplated and specifically set forth in the lease. [¶] And because there was this provision about harmonizing that, there was concern by Disney of what the implications might be. Does that mean that they have to adopt CC&R's that were compatible with the Sportstown, and does that mean if a merchant's association is set up for Sportstown, that they have to join it and engage in joint advertising? [¶] So 22(c) gave the protection to Disney that they wouldn't have to adopt such future policies and procedures because this was not a covenant of the lease. So she will testify to that. And that's all based upon discussions with Disney attorneys."

Although more specific than Draffin's proposed testimony regarding section 11(f), the offer still failed to set forth the "actual evidence" Anaheim sought to present. Specifically, although the offer of proof indicated Draffin would testify about

the “discussions with Disney attorneys,” the offer failed to describe who said what. In addition, even within the portion quoted above, the offer of proof at times drifted away from describing Draffin’s proposed testimony and slipped into legal argument.

Even assuming the offer regarding section 22(c) satisfied Evidence Code section 354, we conclude exclusion of Draffin’s testimony did not result in a miscarriage of justice. Read most charitably toward Anaheim, the offer of proof demonstrates Draffin would have testified on two matters.

First, Draffin would have testified that she did not have any discussions with Disney representatives that section 22(c) would override and eliminate the covenants in the lease, such as 11(f). But ABLP never argued section 22(c) would override section 11(f). Indeed, in its closing, ABLP argued to the jury: “Ladies and Gentlemen, we are not contending that 22(c) trumps 11(f). I don’t know where that came from. We have never said that.” In its rebuttal closing, Anaheim seized on this portion of ABLP’s argument: “Now, I heard Mr. Theodora say that — I think I just heard him say 22(c) doesn’t trump 11(f). So think about that. That means all this stuff about we have complete right to market apparently isn’t the case because 11(f) would still prevail exactly as I said.” Moreover, Anaheim cites no evidence in the record of any witness testifying that section 22(c) overrides or eliminates the other covenants in the lease. To the contrary, Tavares, one of Disney’s negotiators, provided the following testimony: “Q. Was it your understanding that this section, 22(c), was intended to supersede the requirement of 11(f) that Anaheim be included in the team name? [¶] [A.] The answer is no. [¶] Q. It was not intended to supersede? [¶] A. It was not intended to supersede.” Given there was no dispute section 22(c) did not supersede section 11(f), Draffin’s testimony on this point would have been cumulative and unnecessary.

Second, Draffin would have testified that the purpose of 22(c) was to protect Disney from having to adopt by implication policies and procedures they had not expressly agreed to in the lease. Specifically, Disney expressed concern that section 9(g)

of the lease, requiring Disney to share 20 percent of the income from the sale of preferred seat licenses, might lead Anaheim to claim by implication that Disney must create a preferred seat license program. Also, Disney was concerned that section 8(a) of the lease, requiring the parties “to harmonize the future development of Sportstown with the Stadium,” might by implication require Disney to cooperate with Anaheim in other endeavors, such as a joint marketing plan.

We fail to perceive how the foregoing testimony would have aided Anaheim. If Draffin established that section 22(c) was intended to protect Disney from having to adopt a particular marketing plan by implication based on some other lease provision, ABLP undoubtedly would have used the testimony to bolster its cause. Specifically, nothing in the lease expressly required ABLP to include “Anaheim” in its marketing of the team. Yet, Anaheim claimed ABLP was required to do so by implication based on section 11(f). According to Draffin, this is what Disney sought to avoid by agreeing to section 22(c).

In addition to testimony regarding sections 11(f) and 22(c), the offer of proof included testimony regarding section 41(u)<sup>6</sup> of the lease. Anaheim, however, does not mention this portion of the offer in its opening brief, and therefore does not explain how the trial court erred in excluding this evidence or how its exclusion may have affected the verdict. Anaheim attempts to cure this omission in its reply brief by arguing the necessity of Draffin’s testimony on 41(u). Because Anaheim raised this matter for the first time in its reply brief, ABLP was deprived of the opportunity to respond and therefore we need not consider the matter further. (See *Feitelberg v. Credit Suisse First*

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<sup>6</sup> Section 41(u) of the Lease provides: “**Consideration for Landlord's Obligations.** The parties hereby recognize and agree that there are substantial benefits to the City of Anaheim and its inhabitants resulting from Tenant occupying the Baseball Stadium and causing the Team to play its home games therein, and it is hereby agreed that Landlord’s obligations to make payments under this Lease in any year of the Term are contingent upon and in consideration of Tenant's occupying the Baseball Stadium and the Team playing its home games therein.”

*Boston, LLC* (2005) 134 Cal.App.4th 997, 1022 [“‘Points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before’”].)

The dissent finds the offer of proof sufficient, but fails to address our conclusion that Draffin’s proposed testimony on section 22(c) was both unnecessary and unhelpful to Anaheim. Nor does the dissent confront Anaheim’s waiver of the issue concerning Draffin’s testimony on section 41(u) when it failed to raise the matter in its opening brief. Finally, to compensate for Anaheim’s inadequate offer of proof regarding Draffin’s proposed testimony on section 11(f), the dissent paraphrases the offer in a manner more favorable to Anaheim than was presented to the trial judge.

Implicitly recognizing the weakness of Anaheim’s oral offer of proof, the dissent claims Anaheim preserved the issue for review in its brief filed during trial. Specifically, the dissent refers to two statements in the brief regarding Disney’s representations to Anaheim. Anaheim failed to mention these statements in its oral offer of proof. Although Evidence Code section 354 allows a party to preserve issues for appellate review through means other than an offer of proof, here the trial court required an oral offer of proof, and cautioned Anaheim that “if you have something that you think is important and critical in your case that she’s going to testify to . . . you better make your offer now.” The court encouraged Anaheim to make a complete offer and allowed Anaheim the necessary time to do so. Significantly, at no time during its lengthy offer did Anaheim refer to its brief. Under these circumstances, the trial court was justified in relying solely on Anaheim’s offer of proof in determining whether to exclude Draffin’s testimony.

Even if we consider the two statements in Anaheim’s brief filed during trial, we would not conclude a miscarriage of justice occurred. The dissent cites *Kessler v. Gray* (1978) 77 Cal.App.3d 284, 292, for the proposition: “Where the evidence relates to a critical issue, directly supports an inference relevant to that issue, *and other evidence*

*does not as directly support the same inference*, the testimony must be received over a[n Evidence Code] section 352 objection absent highly unusual circumstances.” (Italics added.) Here, Anaheim already had presented evidence of the two matters referenced in its brief.

Specifically, the first statement the dissent cited from Anaheim’s brief was that “Draffin was going to testify that Disney representatives ‘indicated the name[s] of the team allowed under the team name provision were Anaheim Angels, Angels of Anaheim, or either of those with a different mascot.’” (At p. 16, *post.*) On this subject, one of Disney’s negotiators, Tavares, testified: “Q. Did you have discussions with City representatives back in 1996 that the team name would be either Anaheim Angels or Angels of Anaheim, or one of those forms with a different mascot or nickname? [¶] THE WITNESS: We had a discussion that basically said that Anaheim would be in the name. And when I was asked why we wouldn’t agree to it in a written document, why we struck it as being Anaheim Angels, we told them that Michael [Eisner] hadn’t decided on, to use your term the mascot name. I don’t call it the mascot name, I call it the team name, Angels, okay, whether it was going to be Angels of Anaheim, Mighty Angels of Anaheim, Anaheim Angels or Anaheim Mighty Angels or any combination thereof.”

The second statement the dissent cited was “Draffin was going to testify that ‘Disney representatives indicated the City would receive *the same type of publicity other cities receive* from having a Major league Baseball team named after them.’” (At p. 16, *post.*) On this subject, Tavares testified: “From the earliest phase of the negotiations we, Disney negotiators, represented Anaheim would get what the S[t]ate of California had been getting for the past 30 years with the California Angels name, and that the Anaheim name would be used in the same way all other major league teams were using their team names in publicity, schedules, press releases, media guides, merchandise, calendars, tickets, and other medium where the team name was used.”

Thus, other evidence directly supported the same inference as Draffin's proposed testimony mentioned in the brief. Accordingly, even if we consider the statements in Anaheim's brief, we conclude the trial court's ruling does not require reversal of the judgment.

D. *The Trial Court Did Not Err in Allowing Mead to Testify Without Being Designated an Expert*

Anaheim contends the trial court erred by allowing Tim Mead, ABLP's vice-president of communications, to testify without being designated an expert. We disagree.

Upon a proper demand, a party is required to designate any person, including employees of parties, who will offer an expert opinion at trial. (Code Civ. Proc., §§ 2034.210, subds. (a) & (b), 2034.260.) If a party unreasonably fails to list a witness as an expert, "the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party." (Code Civ. Proc., § 2034.300) The question here, however, is whether Mead testified as an expert.

"[B]y definition, an 'expert' witness is one entitled to give opinion testimony. Evidence Code section 801 provides that an expert's opinion testimony must generally be '[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . .'" (*Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 34.) Anaheim identifies three specific areas of Mead's testimony that constituted expert testimony: "Mead opined that Anaheim has not virtually disappeared from the Team name, based on a Lexis-Nexis search that he and his staff performed regarding newspaper articles. . . . [¶] Mead opined that there are over a half million hits for 'Los Angeles Angels of Anaheim' on Google and Yahoo based upon his searches during the week he testified, . . . although he admitted he was not an expert on Google or search engines. . . . [¶] Mead opined that the name 'Los Angeles Angels of

Anaheim’ had not vanished from television broadcasts based upon clips gathered by television networks at the request of Mead and his staff.”

The purported “opinions” Mead provided were not expert opinions at all, but merely a lay summary of his observations. For example, it was not Mead’s “opinion” that internet searches turned up over a half million hits for “Los Angeles Angels of Anaheim”; it was an observable fact. Similarly, Mead’s opinion that the full team name had not disappeared from newspaper articles or television broadcasts was based on observations that any lay person could have made, if given the same source material.

Anaheim’s pique with Mead’s testimony arises in part from the inherent difficulty in proving a negative. Anaheim felt it prudent to use expert testimony to demonstrate the nonexistence of “Anaheim” in the media. ABLP did not need expert testimony to demonstrate that the media included “Anaheim” in identifying the Angels; it needed only to collect samples of it.

The present situation is similar to a trial where the plaintiff’s expert witness opines, based on a complex statistical analysis, that rainbow trout are extinct from a particular river, and the defendant rebuts the opinion with the testimony of a boy scout who caught five rainbow trout in the river the day before. The boy scout’s observations do not constitute an expert opinion, even if the boy scout had earned his fishing merit badge. We conclude Mead did not testify as an expert witness and therefore the trial court did not err in allowing his testimony.

E. *The Trial Court Did Not Err In Rejecting ABLP’s Attorney Fee Claim*

Before trial, ABLP moved to strike Anaheim’s attorney fee prayer in its complaint on the grounds the lease provision Anaheim relied upon, section 36(a), constituted a pure indemnity clause and not a prevailing party attorney fee provision. Anaheim opposed the motion, arguing the wording of the provision supported a prevailing party attorney fee award. The trial court denied the motion to strike, leaving

the issue open for further proof. Following trial, the parties tried the attorney fee issue to the court. After considering the language of section 36(a) and extrinsic evidence on the meaning of the provision, the trial court denied ABLP's fee request, concluding the parties had not intended to allow recovery of attorney fees under 36(a).

ABLP contends the trial court erred because (a) Anaheim's previous victory in defeating ABLP's motion to strike judicially estopped Anaheim from arguing section 36(a) was not a prevailing party attorney fee provision; and (b) the plain language of section 36(a) entitled ABLP to attorney fees. We disagree.

“““Judicial estoppel precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position. [Citations.] . . .” [Citation.] The doctrine [most appropriately] applies when: “(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.” [Citations.] [¶] ““The doctrine's dual goals are to maintain the integrity of the judicial system and to protect parties from opponents' unfair strategies. [Citation.]”” [Citation.] Consistent with these purposes, numerous decisions have made clear that judicial estoppel *is an equitable doctrine*, and its application, even where all necessary elements are present, is discretionary. [Citations.]” (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422-423, original italics.)

Anaheim contends the third element of the forgoing test has not been met because the trial court did not adopt Anaheim's position, but merely reserved the issue for future proceedings. Anaheim's assessment is correct. Commenting on its denial of ABLP's motion to strike, the court noted: “[I]t's not unlike overruling a demurrer on, say, a breach of contract cause of action. I'm not ruling that there is in fact indeed a

contract there. [¶] . . . [¶] The jury’s going to decide that . . . subject to later proof . . . if they’re really entitled to attorney’s fees.”

Moreover, even if the trial court had initially adopted Anaheim’s position, ABLP fails to demonstrate the trial court abused its discretion in failing to apply the judicial estoppel doctrine here. Specifically, ABLP has demonstrated no prejudice or harm from Anaheim changing its position. Indeed, ABLP has changed its position to the same degree and with the same nimbleness that Anaheim has done, with no explanation for its sudden change of heart other than — while engaged in what might be described as a high stakes round of musical chairs — ABLP happened to be sitting in the right spot when the music stopped.

We now turn to section 36(a), which provides: “Tenant’s Indemnification Obligations. Tenant shall indemnify, defend and hold harmless Landlord, and its agents, officers, directors, employees and elected and appointed officials acting in their respective official capacities and not in any personal capacity (collectively, ‘Landlord Indemnitees’) from and against any and all demands, losses, judgments, damages, suits, claims, actions, liabilities and expenses (including all reasonable attorneys’ fees and expenses), in law or In equity, of every kind and nature whatsoever, which any Landlord Indemnatee may suffer or sustain or which may be asserted or instituted against any Landlord Indemnatee caused by (except to the extent caused by the negligent acts or willful misconduct of any Landlord Indemnatee): (1) injury to or death of any person (including spectators, players and other Landlord employees and Tenant employees) or damage to or destruction of property caused by Tenant’s use or occupancy of the Baseball Stadium or the Parking Area (or any portion thereof), including any act of patrons or invitees of Tenant; (ii) the breach by Tenant of any of its warranties or representations made in this Lease; (iii) Tenant’s misrepresentation, breach of warranty, or breach of covenant[;] (iv) any negligent acts or omissions or intentional misconduct of Tenant[;] (v) any discretionary act of Tenant in operating the Baseball Stadium and

Parking Area[;] (vi) the renovation construction process, including the design, methods, material or means of construction of any renovation work carried out at the Baseball Stadium by or under the direction of Tenant[;] or (vii) any violation of law by Tenant. If any action or other legal proceeding shall be brought against a Landlord Indemnitee by reason of any claim, demand, loss or cause of action indemnified pursuant to this Section 36(a), Tenant, upon notice from Landlord, shall resist and defend any such action or other legal proceeding with counsel approved by Landlord, which approval shall not be unreasonably withheld, delayed or conditioned. Tenant's obligations to indemnify Landlord under this Section 36(a) shall survive the expiration or earlier termination of this Lease."

"Indemnity agreements are construed under the same rules which govern the interpretation of other contracts. [Citation.] Accordingly, the contract must be interpreted so as to give effect to the mutual intention of the parties. [Citation.] The intention of the parties is to be ascertained from the 'clear and explicit' language of the contract. [Citation.] And, unless given some special meaning by the parties, the words of a contract are to be understood in their 'ordinary and popular sense.' [Citation.]" (*Continental Heller Corp. v. Amtech Mechanical Services, Inc.*) (1997) 53 Cal.App.4th 500, 504 (*Continental Heller*).)

Section 36(a) appears on its face to be a fairly typical third-party indemnity provision. "A clause which contains the words 'indemnify' and 'hold harmless' is an indemnity clause which generally obligates the indemnitor to reimburse the indemnitee for any damages the indemnitee becomes obligated to pay third persons." (*Myers Building Industries, Ltd. v. Interface Technology, Inc.* (1993) 13 Cal.App.4th 949, 969.) Given the sophistication of the parties and the expertise of their legal advisors who put the lease together, one would assume if the drafters had intended the prevailing party in a dispute over the lease to recover attorney fees, they would have stated this more clearly.

ABLP relies, as did Anaheim previously, on *Continental Heller*, in which the court construed an indemnity and attorney fee provision of the contract. *Continental Heller*, however, undermines ABLP's argument. The indemnity provision in that case provided that the defendant indemnify the plaintiff "from all loss, damage, etc., 'including attorney's fees' which 'arises out of or is in any way connected with the performance of work under this Subcontract.'" (*Continental Heller, supra*, 53 Cal.App.4th at p. 508.) The court noted that despite the indemnity provision's reference to attorney fees, the section would not entitle the plaintiff to an award for fees incurred due to the defendant's breach of the agreement. The agreement in *Continental Heller*, however, contained a second subparagraph that provided: "'And the Subcontractor shall indemnify the Contractor, and save it harmless from any and all loss, damage, costs, expenses and attorney's fees suffered or incurred *on account of any breach of the aforesaid obligations and covenants, and any other provision or covenant of this Subcontract.*'" (*Id.* at pp. 508-509, original italics.) Because this clause was separate from the indemnity provision, and did not refer to indemnity for attorney fees incurred in defending actions against the plaintiff, the court concluded the plaintiff could recover attorney fees against the defendant for failing to honor the third party indemnity provision. (*Id.* at p. 509.)

Here, there is no separate clause calling for attorney fees. The operative clauses in 36(a) both refer to third party claims against the "Landlord's Indemnitees." Indeed, the provision requiring the tenant "to defend any such action or other legal proceeding with counsel approved by Landlord" makes no sense in a first party context. The wording of section 36(a) alone does not entitle ABLP to attorney fees expended in defending the present action.

The trial court, however, also considered extrinsic evidence submitted by the parties. In ruling in Anaheim's favor, the court expressly noted that the parties' lease constituted an amendment to an existing lease which contained an express first party

attorney fee provision. Because Disney and Anaheim dropped the express first party attorney fee agreement from the lease, the trial court concluded the parties intended to delete it. Because the plain language of the provision and substantial evidence supports the trial court's ruling, we conclude the trial court did not err in denying ABLP's attorney fees.

\* \* \*

As a final point, we respond to the dissent's assertion the name Los Angeles Angels of Anaheim "is a farce" contrived to deprive Anaheim "of the very benefit of the contract term . . ." (At p. 10, *post.*) As we observed in our unpublished decision involving Anaheim's preliminary injunction request: "Anaheim introduced evidence demonstrating it negotiated for national name recognition through association with the team[;] substantial evidence also demonstrated Disney sought maximum flexibility for itself and any new team owner." (*City of Anaheim v. Superior Court* (June 27, 2005, G035159).) The jury, faced with this competing evidence and provided with the appropriate instruction on the implied covenant of good faith and fair dealing, determined the name "Los Angeles Angels of Anaheim" was not unreasonable under the circumstances and did not deprive Anaheim of its bargained-for benefits of the contract. Significantly, Anaheim *does not* challenge the sufficiency of the evidence to support the jury's verdict.

Accordingly, the dissent's argument that Anaheim should have prevailed because it presented overwhelming evidence ABLP acted unreasonably is, in essence, an attack on the jury's decision. But an appellate court may not disturb a jury's verdict simply because it disagrees with the jury's decision, even if the evidence appears to favor the losing side. (See *Leff v. Gunter* (1983) 33 Cal.3d 508, 518 ["we have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom"].) Arguing "the case should never have gone

to the jury in the first place,” the dissent would grant through judicial fiat what the jury determined Anaheim failed to obtain at the bargaining table.

The dissent’s position is akin to declaring the Angels the victor in its playoff series against Boston because the Angels had the best record in baseball and won the regular season series against the Boston Red Sox. But the Angels lost to Boston when it mattered, just as Anaheim lost its jury trial with ABLP. The dissent queries whether the Angels’ playoff defeat was attributable to a curse. Delving into the occult is beyond the standard of review. But if there is a curse hanging over the Angels, it may well be this lawsuit. Hopefully, our decision today will bring to a close the parties’ long season of conflict.

#### IV

#### DISPOSITION

The judgment and order denying attorney fees are affirmed. In the interests of justice and because neither appellant prevailed on appeal, each party is to bear its own costs of the appeal.

ARONSON, J.

I CONCUR:

O’LEARY, J.

I respectfully dissent.

The case poses an issue important to taxpayers, because the law, specifically section 1069 of the Civil Code, provides that grants of interests in land by public entities to private parties -- which is what we have here -- must be interpreted in favor of the public entity. Indeed, this statute appears to have been intended to prevent the sort of thing that happened in this case, where a public entity does not receive the full measure of the consideration promised it for its grant of public land.

The trial court, however, refused to instruct the jury about that law, and, as a result, we end up with the oxymoronic monstrosity that is “The Los Angeles Angels of Anaheim.” Had the jury been told that they were required to interpret any ambiguity in the lease in favor of the city, any doubt about the proper interpretation of the lease’s key words (“Tenant will change the name of the Team to include the name ‘Anaheim’ therein”) would have been resolved in favor of the City of Anaheim.

The trial court also made two other major errors in the conduct of the trial, each of which virtually predetermined a verdict in favor of the Angels Baseball Franchise:

-- The trial court did not instruct the jury about Anaheim’s legal theory of the interpretation of the contract, which derives from section 1649 of the Civil Code. Like Civil Code section 1069, this statute requires a rule of contract interpretation that would not allow the Franchise to relegate the name of Anaheim to virtual invisibility.

-- The trial court did not let one of Anaheim’s key witnesses testify, on the specious ground that her testimony was unduly time consuming. Given that this witness was present at the negotiations between the city and the then-owner of the Franchise, Disney, and was prepared to testify as to what Disney’s negotiators said

to the city's negotiators, the total exclusion of her testimony can only be deemed as an abuse of discretion.

*I. Not Instructing the Jury About the  
Law Applicable to Grants of Land from  
Public to Private Entities*

This case, at root, involves the interpretation of a lease, in which a public entity, the City of Anaheim, is the lessor, and a private entity, the Franchise, is the lessee. In the lease, the private entity is given a grant in an interest in land from the city under certain terms and conditions.

There is a statute, Civil Code section 1069, that protects public entities (and thus the taxpayers) whenever there is doubt in such a grant. Civil Code section 1069 provides: “[E]very grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor.”

Had the jury been instructed on this law, there would have been no possibility of any “Los Angeles Angels of Anaheim” nonsense coming anywhere close to actually complying with the contract. Any (arguable) ambiguity in section 11(f)<sup>1</sup> would have had to have been interpreted in the city's favor, which would have meant, for example, a name that complied with the custom and practice of major league baseball. The trial court, however, refused Anaheim's request to give the jury instruction on Civil Code section 1069.

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<sup>1</sup> In an unpublished decision involving the denial of the city's request for a preliminary injunction (*City of Anaheim v. Superior Court* (G035159, June 27, 2005) [2005 WL 1523338] (“*Anaheim v. Angels Baseball I*”), I dissented, believing that the relevant language in the lease cannot *reasonably* be interpreted to allow for the name, “The Los Angeles Angels of Anaheim.” That is, the city was entitled to win this case as a matter of law. I still maintain that position.

The majority opinion upholds the refusal by splitting the idea of the *grant in the interest in land from the public entity* from the idea of the *consideration paid by the private entity* for the grant of that interest.<sup>2</sup>

The separation of consideration from the grant of the interest of land, however, is directly contrary to at least two California Supreme Court cases.

In *County of L.A. v. Southern Cal. Tel. Co.* (1948) 32 Cal.2d 378, there was a dispute between a county and a telephone company over whether the telephone company had to pay for “the privilege of maintaining its lines and poles on streets and highways outside of incorporated areas,” i.e., on county land. (*Id.* at p. 380.) At trial the county had lost its request for an injunction requiring such payment, and the Supreme Court had undertaken to consider the county’s claim. The county’s main argument was that the use of the land without charge to the telephone company was an unconstitutional *gift* of public moneys.

The high court began with the proposition that the right of the telephone company to have lines and poles on the street in the first place was a “franchise” derived from a statute (former Civil Code section 536) which -- and this is significant -- the court said that the statute created a “contract between the company and the state” which was accepted when a telephone company used and maintained telephone lines on public property. (*County of L.A., supra*, 32 Cal.2d at p. 382.)<sup>3</sup> However, in this contract, there was an implied term: The telephone

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<sup>2</sup> The key sentences from the majority opinion are: “[S]ection 11(f)’s team name provision did not affect Anaheim’s leasehold interest and merely formed part of the consideration for the agreement,” (maj. opn. at p. 3) and “Here, section 11(f) merely describes part of the consideration Disney paid for the Anaheim’s grant of the leased stadium premises. Because section 11(f) does not affect the nature or scope of that grant, section 1069 is inapplicable.” (Maj. opn. at p. 30).”

<sup>3</sup> Here is the exact language of what the court said: “As applied to telegraph companies, it has been held that section 536, as it existed prior to 1905, was effectual to grant a state franchise, and that *the use of the highways, and the maintenance and operation of the telegraph system, constituted an acceptance of the provisions of the statute and resulted in a contract between the company and the state* which was secured by the federal Constitution against impairment by

company, by accepting the contract, agreed in return to continue to “furnish proper and adequate communication service to the public.” (*Id.* at p. 384.) That is, the furnishing of continued communication service to the public was the consideration paid by the telephone company in return for the use of public land. And it was in that context that the Supreme Court expressly used section 1069 to link the consideration given by the telephone company to the use of public land -- the two could not be separated. Here is the passage: “The franchise is *conditioned* not only on the establishment of lines by a telegraph or telephone corporation, but also, *by necessary implication, on the continued operation of the system. The grant under section 536 must be construed in favor of the state. (Civ. Code, § 1069.)* As so construed it must be held to be a grant to use public roads and highways *so long as* telegraph or telephone communication service is continued and that the acceptance of the franchise involves an assumption of the duty to furnish proper and adequate communication service to the public. Obviously, the state receives a substantial benefit from the continued operation of such a system, and the question is whether, notwithstanding that benefit, the grant comes within the constitutional prohibition [against gifts].” (*County of L.A., supra*, 32 Cal.2d at p. 384.)

The italicized words of the passage show that the Supreme Court, as common sense would indicate, recognized that Civil Code section 1069 does not apply to just the one half of a contract which involves the “scope” of the land interest that is conveyed (as the majority opinion here seems to think). Rather, section 1069 also applies to what the “grant” is *conditioned on*, namely, the consideration that the public entity gets *in return* for the land interest conveyed. Note the words “conditioned . . . on” and “so long as” in the passage.

If I read the majority opinion correctly, it attempts to distinguish *County of L.A.* by parsing something that it calls the “temporal scope” of the grant from the

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subsequent state legislation.” (*County of L.A., supra*, 32 Cal.2d at pp. 381-382,

idea of consideration. The theory seems to be: *County of L.A.* dealt with the “temporal scope” of the grant (ergo, section 1069 applicable), and only coincidentally “also involved the consideration for the grant” (ergo, the case doesn’t stand for the idea that consideration is within the ambit of section 1069).<sup>4</sup> That’s like saying that the rent on your house is merely the “temporal scope” of the landlord’s “grant” to you, and doesn’t really involve the consideration you pay for that grant.

In point of fact, the Franchise’s rights to use the stadium *are* diminished by how one interprets section 11(f). If the Franchise hadn’t agreed to the naming clause, it wouldn’t have gotten *use* of the stadium in the first place.

The principle that the consideration for the grant of the interest of land cannot be separated from the grant itself was also articulated by the high court again in *Southern Cal. Gas Co. v. City of L.A.* (1958) 50 Cal.2d 713. In *Southern California Gas*, a city wanted to construct a sewer line, but the construction necessitated the relocation, of some gas lines -- not on city land but county land -- owned by a private entity. A dispute arose over who was to bear the cost of the relocation of the lines. (*Id.* at pp. 715-716.) The private gas company asserted that its “franchise” already gave “express terms” defining its “obligation to relocate its lines at its own expense,” namely grade changes in highways, and the relocation costs of moving lines outside the city’s territorial limits weren’t included in those express terms. (See *id.* at p. 717 [“The company contends, however, that any implied obligations in its county franchise to relocate its pipes cannot be invoked for the benefit of the city operating outside its territorial limits.”] and p. 718 [noting the terms of section 8 of the franchise].)

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italics added.)

<sup>4</sup> The relevant text from the majority opinion is: “The court’s use of the phrase ‘so long as’ indicates the ongoing delivery of telephone service acted as a limitation on the temporal scope of the grant. That this limitation also involved consideration for the grant does not remove it from the scope of Civil Code section 1069.” (Maj. opn. at p. 31.)

The trial court had entered judgment in favor of the private gas company allowing it to recover its relocation costs, but the Supreme Court reversed, with directions to enter judgment for the public entity. In reversing, the Supreme Court (again) treated the terms under which the land use was granted with what the private entity had agreed to (if only impliedly) in return. The court said: “It is unnecessary to determine, however, whether the county was empowered to grant a franchise including the right to the compensation here sought, for we have concluded that *properly interpreted* the *company’s franchise* included no such right. [¶] As a public grant the franchise is to be construed in favor of the public interest. [Citations, ending with Civ. Code § 1069].) The court noted then that the use of public lands for gas lines -- the “franchise” -- was “granted upon each and every condition herein contained.” (*Southern California Gas, supra*, 50 Cal.2d at p. 719-720.) Note: The high court used section 1069 to interpret “the franchise” itself, including implied relocation cost terms which would be part of the consideration given by the private entity, not just the scope of the land granted by the public entity, divorced from other parts of the contract.

The majority’s tendency to parse off theoretical (perhaps imaginary would not be too strong a word) aspects of a grant from the consideration given for the grant also forms the basis of its attempt to distinguish *Southern California Gas* -- only this time, instead of “temporal scope,” it’s “legal scope.” *All* consideration given for a grant of land, however, can be denominated the “legal scope.” And, ironically, that’s my point -- you can’t divorce the “legal scope” of a grant of land from the consideration given for it.

What *Southern California Gas* said about the use of the land being “granted upon each and every condition herein contained” may also be said in the case before us. The “grant” of the use of Anaheim Stadium (or whatever it is called this week), built at taxpayer’s expense, was *conditioned* on certain consideration, one important item of which was the inclusion of the name Anaheim in the team name. It is contrary to precedent, and common sense, to assume that what the

public entity *gave* in terms of land is covered by section 1069, but what it *got*, under the very same contract, is not. Properly understood, the grant to the Franchise of the use of the stadium was intertwined with -- conditioned on -- the Franchise's agreement to include the name Anaheim in the team name.

## II. *Not Instructing the Jury According to Civil Code Section 1649*

The city proposed a jury instruction that closely tracked the statute in the Civil Code, section 1649, that governs the interpretation of the key provision in the contract, section 11(f), the provision that requires the inclusion of the name Anaheim in the team's name.

Here is the proposed instruction: "The terms of Section 11(f) of the lease must be interpreted based on the promisor's (Disney) belief of how the promisee (the City) understood the promise at the time the promise was made." The trial court refused to give the instruction.

The majority opinion upholds the rejection on two theories: One, the reference to "the promise" at the end of the sentence was ambiguous, because there was evidence of certain oral promises that Disney, the franchisor at the time, made in the negotiations *beyond* what was in the contract, and "the promise" might have referred to them as well. As the majority opinion describes it, the then-franchise owner, Disney, "had an incentive to promise and deliver more than it was willing to 'hardwire' into the lease."

And two, the instruction was defective because it didn't tell the jury that the city's understanding of the promise had to be objectively reasonable.

These rationales are not persuasive.

As to the first, in context, there was no reasonable ambiguity over what "the promise" was, because the proposed jury instruction *began* by telling the jury that they were interpreting section 11(f). My colleagues forget that the instruction itself, indeed the whole case, was over the interpretation of section 11(f). In context of the instruction, *the* promise could not reasonably have referred to some

unenforceable oral promises floating off in the ether -- it had to refer to the very clause that gave rise to the litigation.

As to the second, my colleagues forget that there is no issue in this case as to whether *the city's understanding* of the promise was objectively reasonable. The only issue was whether *the Franchise's interpretation*, one that allows the name of Anaheim to be relegated to de facto invisibility, was even possible under the contract.

This latter point is particularly salient in the case before us, because of its ominous implications for the law of contract interpretation generally, and the law of bad faith in particular.

Remember that under the Franchise's legal theory, *any* inclusion of the name "Anaheim" in the team, no matter how ridiculous, satisfies the contract. Accordingly, the "official" team name could resemble a Monty Python-esque satire on long names, and that would supposedly be okay under the contract: "The Los Angeles Angels Whose Owner Covets the Southern California Market and Who Doesn't Want to Acknowledge That the Team Actually Plays in Anaheim" could, theoretically, as an "official" name, satisfy the contract terms, at least under the Franchise's theory.

But the Franchise's interpretation runs counter to the law of bad faith, and the jury instruction would have let the jury know that. If the jury had had to interpret section 11(f) from the point of view of how Disney understood Anaheim to have understood the promise, it would have recognized that Anaheim would never have gone along with an *interpretation that deprived it of the very benefit for which it bargained*.

But ah, says the majority opinion, the jury was elsewhere instructed about the existence of the covenant of good faith and fair dealing, the refused instruction tracking section 1649 "presents a separate issue" from the covenant of good faith.

Sorry, can't buy it. The covenant of good faith and section 1649 are linked. If the jury had been forced to focus on how Anaheim understood the promise

made by the Franchise in section 11(f), it could have put two and two together. The jury would have seen that the Franchise was out to exploit an unreasonable, literalist interpretation of section 11(f) -- let's call it Interpretation Tamerlane Style (readers will soon see that the point was indeed pressed in this appeal) -- to the detriment of the promise of having Anaheim in the name of the team. Without the section 1649 instruction, the significance of the covenant of good faith could easily have whizzed by the jury without notice.

When a contract provides that one party has discretion in performing a term of a contract, the law requires that party to use its discretion in good faith, and not in such a way as to deprive the other party of *its* benefits under the contract. (E.g., *Third Story Music, Inc. v. Waits* (1995) 41 Cal.App.4th 798, 806.)

At oral argument, the city's counsel gave an apt analogy as to why the formulation "Los Angeles Angels of Anaheim" deprives the city of the benefit it bargained for: The conqueror Tamerlane once besieged a city. Its inhabitants surrendered on his promise that he would not "shed" any of their "blood." He didn't. He buried them alive. Here, the Franchise has, in effect, been allowed to get away with a literalist absurdity that deprives the city of any *meaningful* identification with the team.

The majority opinion notes that there was evidence before the trial court to the effect that the city had some warning in the negotiations as to the possibility of a dual geographic modifier. Suppose, only for the sake of argument, we accept that premise. "The Los Angeles-Anaheim Angels" might be oxymoronic, but at least *that* title wouldn't *necessarily deprive* Anaheim of the benefits of big league identification, and the likely abbreviation used in the league standing tables, "LAAA," would at least have another "A" in it so as to remind readers that Anaheim isn't just chopped liver.<sup>5</sup>

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<sup>5</sup> I hasten to add that this example is illustrative only. I don't concede that the "The Los Angeles-Anaheim Angels" would pass muster under the contract. It is at least arguable that the inclusion of a second geographic identifier that was a

But that's not this name. *This* name is a farce obviously contrived to *avoid* any mention of Anaheim in normal conversation or description of the team. *This* name deprives the city of the very benefit of the contract term -- *unavoidable* big league identification.<sup>6</sup> The jury would have seen that if it had been properly instructed.

If this case were published, it would do great violence to the law of bad faith. Imagine this case, for example, if the Franchisor here, as the promisor, were an insurance company and the city was a policyholder. It is well established that an insurance company cannot interpret an ambiguous policy term in its favor. (E.g., *Delgado v. Heritage Life Ins. Co.* (1984) 157 Cal.App.3d 262, 677-678 [disability insurer interpreted the term "physical injury" not in a way to comport with "ordinary English usage" so as to deny a claim; held, it breached the contract].) And an insurer's "inherently unreasonable" interpretation of an ambiguous term in favor of itself exposes that insurer to tort and even punitive damages. (E.g., *Congleton v. National Union Fire Ins. Co.* (1987) 189 Cal.App.3d

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rival city, commonly identified with another area of the state and another baseball team, would be so inimical to the identification of Angels with the City of Anaheim that it also would deprive the city of the benefit of the contract. But at least "The Los Angeles-Anaheim Angels" doesn't radiate an attempt to render the name Anaheim invisible -- a mere hiccup after the real name -- the way "The Los Angeles Angels of Anaheim" does.

<sup>6</sup> A fine legal distinction must be noted in this regard: There is a difference between a merely oxymoronic name with two mutually exclusive geographic identifiers (e.g., the California-New York Panthers) and a name that affirmatively subordinates one geographic entity so as to effectively make that entity invisible, such as the one we have here, The Los Angeles Angels of Anaheim. Which is why the Angels are usually referred to as the "Los Angeles Angels" and the box standing abbreviation is "LAA." In the former case, you have a mere oxymoron, something that is merely awkward and silly. While a bystander might wonder where the hypothetical "California-New York Panthers" actually play, the bystander is at least forced to confront the Panthers' identification with both California and New York. In the latter case, before us now, the de facto invisibility to which Anaheim has been relegated violates a term of the contract.

51, 59 [“When the alleged bad faith conduct consists of the insurer’s interpretation of its ambiguous policy to exclude coverage, that interpretation is not conclusive evidence of bad faith *unless it is ‘inherently unreasonable.’*” (italics added)].)

And the rule that you cannot interpret an ambiguous term to deprive the other party of the benefits of its bargain extends beyond insurance companies. There is an implied covenant of good faith and fair dealing implied by law into all contracts, even non-insurance contracts. (It’s just that insurers face tort and maybe punitive damages when they unreasonably breach their contracts, while other promisors don’t.)

The idea is: A promisor cannot interpret a contractual provision in an unreasonable way such that it deprives a promisee of one of the benefits of the contract. (*Brown v. Superior Court* (1949) 34 Cal.2d 559, 564; *Berkeley Lawn Bowling Club v. City of Berkeley* (1974) 42 Cal.App.3d 280; *Milton v. Hudson Sales Corp.* (1957) 152 Cal.App.2d 418, 427.) Put another way: You can’t exploit a loophole in a contract -- even an unambiguous loophole, not to mention an ambiguous one -- to your own favor in order to deprive the other party of its bargained-for benefit.

*Flying Tiger Line, Inc. v. U. S. Aircoach* (1958) 51 Cal.2d 199 nicely illustrates the rule. There, a charter airline, not doing too well, needed money. The owner of the charter airline made a deal with a company that actually owned and serviced the charter airline’s planes to have the service company extend credit (ultimately about \$73,000) to the airline. The written contract provided that the owner would pledge all his stock in the charter airline to the service company to secure the debt. The contract also provided that it was “specifically agreed” that the owner was “*not personally responsible*” for any of the indebtedness. (*Id.* at p. 200, italics in original.)

Like the owner of the Angels Franchise in the present case and like Tamerlane in the story of the besieged town, the owner of the charter airline in *Flying Tiger* sought to exploit the loophole. Since the contract clearly made the

owner not personally liable for the debt, and the only security for the debt was the stock that the owner had in the charter airline, the owner decided to suck all the money he could out of the charter airline before the service company got the stock. It appears he personally lived very well for awhile on the money that the service company lent his charter airline. (See *Flyer Tiger*, *supra*, 51 Cal.2d at pp. 201-202.) Meanwhile, the pledged stock became worthless. And, having received worthless stock, the service company sued the owner personally, on an alter ego theory, despite the express language in the contract that he was not “personally responsible” for the money owed.

And despite that clause, our Supreme Court upheld a judgment for the roughly \$73,000 owed. The high court construed the “personally responsible” clause in the contract as a “precautionary measure” that simply made it clear that the owner “was not impliedly giving his general promise to be liable for the debt beyond the security posted.” (*Flying Tiger*, *supra*, 51 Cal.2d at p. 203.) “Any other construction,” said the Supreme Court, “would be tantamount to giving” the owner a “‘license to steal.’” (*Ibid.*)

*Milton*, from the Court of Appeal, is similarly illustrative of the law’s rejection of a promisor’s abuse of latitude otherwise afforded in a contract. There, a car dealer sued a manufacturer’s distributor, because the dealer wasn’t getting enough new cars. There was a draconian clause in the contract that said the distributor would “in no event be liable” to the dealer “for any loss or damage because of failure of Distributor to ship or fill” an order, and the distributor even took the position that he had “the privilege of withholding deliveries” even “if the circumstances permitted the filling of orders.” (*Milton v. Hudson Sales Corp.*, *supra*, 152 Cal.App.2d at pp. 424, 432.) That clearly didn’t fly. The rest of the contract indicated that the distributor was obligated to provide the dealer with a reasonable supply of new cars, so the appellate court said there had to be a “good excuse” not to. (*Id.* at p. 424.) The *Milton* court found that the defendant’s belief that he had complete discretion over whether or not to fill the plaintiff’s orders

was “not in accord with common sense or the facts of business life.” (*Ibid.*) The idea that the distributor retained the “unqualified power to refuse for any or no reason to fill any order submitted by Milton” was unreasonable. (*Id.* at p. 431.)

This case is just *Flying Tiger* and *Milton* in a sports law context. In all three cases, a defendant used discretionary power he had under a blinkeredly literalist reading of a contract clause to deliberately deprive the other party of a major benefit it was to receive under the contract.

### III. *Not Letting Anaheim’s*

#### *Key Witness Testify*

##### A. Preliminary History

This case had a previous incarnation in an unpublished opinion, *Anaheim v. Angels Baseball I*, *supra*, [2005 WL 1523338], in which I concurred and dissented (mostly dissented).

The really significant thing about this court’s previous *majority* opinion was this: It was highly dependent on the evidence presented at a preliminary stage of the case and looked forward to trial in which the case would turn on resolutions of disputed fact by the finder of fact. Remember that the dispositive issue in our previous decision was the *narrow* one of whether the trial court abused its discretion in denying the city’s request for a preliminary injunction. (*Anaheim v. Angels Baseball I*, *supra*, at p. 1 [“Our review is narrowly limited to determining whether the court abused its discretion in denying the preliminary injunction.”].) The majority stressed that, “Because of our inquiry’s narrow focus, however, our decision today does not declare *any party the ultimate victor*,” and in fact used a baseball metaphor to emphasize that narrow focus. (*Id.* at p. 1 [“Indeed, at trial, today’s opinion places neither party ahead or behind in the count.”] (*italics added*).)

Thus, in order to underscore the fact that it was a discretionary call based on the quantum of evidence presented on the motion, the previous majority opinion said that extrinsic evidence was admissible to “‘prove a meaning to which

the contract is susceptible’” (*Anaheim v. Angels Baseball I, supra*, at pp. 6-7 [2005 WL 1523338 at p. 4], quoting *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 955.)

In other words, going into the trial, it was extremely important that each side be allowed to present its evidence as to the meaning to which it contended the lease was “susceptible.” The trial court’s decision, then, to exclude one of Anaheim’s key witnesses, Jill Draffin, an outside attorney who was present during the negotiations between the city and Disney, strikes me as nothing short of bizarre.

#### B. The Oral Offer of Proof

Jill Draffin was obviously one of the most material witnesses imaginable. She was present at the creation of the lease, and participated in the actual negotiations. What’s more, a city is not a human being, it can only be represented by its attorneys, either inside or outside, in negotiations. The trial judge, however, apparently became miffed when she asserted the attorney-client privilege in response to “several questions” at her deposition, and required an offer of proof of her testimony.

The majority opinion now quotes only a *small portion* of the total offer of proof as to Draffin’s testimony so as to assert that the offer was self-evidently “insufficient,” because it did not give “any of the specific testimony” that was to come, merely the “subject matters.”

First of all, Draffin obviously had a lot to say about the conduct of the negotiations, hence, at least in this context, it is unreasonable to have expected the equivalent of a deposition summary by way of an offer of proof. It would have meant that the city’s attorney would have provided the actual testimony in the way of the offer of proof, then that testimony would have been repeated again by the witness. (Talk about the undue consumption of time. The very offer of proof as required to be “sufficient” under the standard of the majority opinion would have taken up undue time.)

The actual offer of proof, however, was considerably longer than the majority opinion intimates. It went on, in actual fact, from close to the top of page 1924 of the reporter's transcript and continued on through page 1931 of the reporter's transcript -- a seven-page offer of proof! Indeed, the city's trial counsel in making the offer said: "It goes on and on."

And indeed it did. By the miracle of the cut and paste function of word processing, I have reproduced that seven-page offer of proof in an Appendix to this dissent. To ease readers' eyes, I have bolded and italicized portions of that offer of proof, in order to demonstrate that, indeed, the city's offer included some very specific items indeed.

To wit, the offer of proof included these specific items to which Draffin would have testified:

-- The purpose of a part of the lease, section 41(u), was *not* to exhaustively list all of the benefits "the city got under the lease," but was put in at the behest of "special bond counsel" to deal with the problem that the city could not "incur debt . . . past the income that it [had] for any year," hence section 41(u) was "crafted" to tie the city's obligation to make payments to "a specific obligation that related to the tenant's use of the property."

-- That Disney attorneys orally agreed that the franchisor would "not have discretion" to "disregard the covenants of the lease."

-- That Disney attorneys agree that if the franchisor had discretion under sections 22(c),<sup>7</sup> it would mean that every other covenant in the lease would be "wiped out," including a list of 22 items, not the least of which was the concession for the city's inclusion in the name of the team.

-- That Disney attorneys agreed that the purpose of section 22(c) to simply prevent the franchisor from *later* being forced to do things not in the lease, that

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<sup>7</sup> Counsel for the city misspoke, and said section 22(a), but there is no doubt the trial court knew what he was talking about.

were “foisted” upon it by the city or “by implication,” including a personal seat license policy.

-- That she heard negotiating Disney and city attorneys agree that section 11(f) contemplated the “custom and practice,” which in context, meant the “custom and practice” of big league baseball to have a geographic identifier followed by a mascot name, as indeed happened right after the lease when the team became the Anaheim Angels.

These specific items are “manifestly” sufficient by any fair standard, but the entire offer of proof is particularly sufficient in context of this trial. As another of the city’s trial counsel pointed out, there had already been considerable testimony from “laypeople” as to the meaning of the terms of the lease -- the least the trial court could do was to have an attorney there who was familiar with those “terms.”

### C. “Other Means”

But, second, and something the majority opinion ignores, there are more ways of preserving an issue than just the oral offers of proof. Let’s re-read Evidence Code section 354. It says that that a judgment cannot be set aside unless the *substance* of the excluded evidence “was made known to the court by the questions asked, an offer of proof, *or other means.*” (Italics added.)

In this case, any arguable deficiency in the (extensive to say the least) offer of proof was cured by the city in a written brief as to why Draffin should be allowed to testify. In that brief, there was (even more) “specific testimony” cited: Draffin was going to testify that Disney representatives “indicated the name of the team allowed under the team name provision were Anaheim Angels, Angels of Anaheim, or either of those with a different mascot.”

Even more importantly, Draffin was going to testify that “Disney representatives indicated the City would receive *the same type of publicity that other cities receive* from having a Major League Baseball team named after them.” (Italics added.)

If Draffin had been allowed to testify, those last two items would have been presented *live*, which, as every trial lawyer knows, could have made a big difference to the jury. Antonio Tavares had only testified by videotaped deposition.

That certainly was specific enough, and, if Draffin had been believed by the jury, the city would have easily won the case. Draffin would have established that *Disney* realized that, despite whatever “flexibility” was inherent in section 11(f), such flexibility did not extend to names that relegated Anaheim to invisible status.

#### D. A Manifest Abuse of Discretion

##### Under Section 352

As our high court said in *People v. Karis* (1988) 46 Cal.3d 612, 638, “‘The “prejudice” referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.’” (*Id.* at p. 638.) That is, as probity goes up, the prejudice goes down. There was, of course, absolutely nothing “prejudicial” in the Evidence Code section 352 sense of the word about Draffin’s testimony. (She wasn’t going to show autopsy photos to the jury -- the classic example of section 352 “prejudice,” that is, emotionality with little or no probative value.)

The *Karis* principle of the interrelationship between prejudice and probity surely applies with even more force to the relationship between undue consumption of time and probity. After all, “unduly prejudicial” evidence (like autopsy photos) risks biasing the jury against a given party. Evidence that is merely time consuming risks a marginal amount of extra time in a trial and perhaps boring the jury (and if the evidence obviously should be admitted and would have made a difference, the error will require a much greater consumption of time down the line -- trial court haste makes waste).

Here, in context, Draffin’s testimony would not have been unduly time consuming, particularly in relationship to its high degree of probity and the mere

marginal increase in time that it would have entailed. After all, the reporter's transcript in this case is, literally, more than 3,500 pages long. Her testimony might have increased an already long total trial time by what -- 10 percent at most?

But in return for the cost represented by a marginal increase in time spent on a long case anyway, Draffin's testimony went directly to the core issue of the case, which was the intent of the parties. As the court said in *Kessler v. Gray* (1978) 77 Cal.App.3d 284, 292: "Where the evidence relates to a critical issue, directly supports an inference relevant to that issue, and other evidence does not as directly support the same inference, *the testimony must be received over a section 352 objection absent highly unusual circumstances.*" (Id. at pp. 291-292, italics added.) Here, we have as clear a case of an abuse of discretion in not allowing evidence in under Evidence Code section 352 as is possible to imagine.

#### IV. Conclusion

Had the jury been properly instructed, particularly about Civil Code section 1069, it is unimaginable that the Franchise would have prevailed. No reasonable jury could have, consistent with Civil Code section 1069 or Civil Code section 1649, interpreted the lease to allow for an oxymoronic team name that renders the name of Anaheim de facto invisible. Indeed, under those sections, I would hazard to say that the city should have won as a matter of law and the case should never have gone to the jury in the first place.

The Angels have played in a stadium built at public expense since 1966. However, at the beginning of the 2007 season, they changed their name to the Los Angeles Angels. That is their *effective* name, not what is in the fine print. They had a great 2007 season, but lost three straight in the first round of the playoffs -- significantly, to Boston.

This year they had the best record in baseball, but lost three of four in the final round of the playoffs. Again, to Boston.

It as if the Curse of the Bambino had been taken from Boston and hung on the Angels.

But curses can be lifted. Previous rumors of a curse circulated when the team was the California Angels. It was *only* as The Anaheim Angels that the team, in 2002, won the World Series. The city must have its due, negotiated in the contract.

Bad trial court decisions can indeed be exorcized. That is what reviewing courts are for. This court should rectify the manifest injustice done to the city by the trial court, and remand for a retrial that requires the trial court to do it again, this time correctly. The jury must be instructed that grants of interests in land by public entities to private ones are interpreted in favor of the public entity. It must be instructed about Civil Code section 1649, with its inevitable implication that contracts cannot be interpreted in such a way that one party gets to use its discretion to deprive the other of a bargained-for benefit under the contract. And Anaheim must be allowed to put on one of its most important witnesses, one who saw and heard the original negotiations between the city and Disney.

SILLS, P. J.

## Appendix to Dissent

THE COURT: OKAY. WE'LL START AT 1:45 IF WE HAVE TO. . . .

. . . .  
IF SOMEONE IS HERE WHO CAN TESTIFY WHO'S GOING TO TESTIFY IN YOUR CASE, THEN CALL THAT PERSON. AND IF IT'S MR. MORENO OR MR. KUHL OR ANYONE ELSE WHO'S GOING TO TESTIFY, THEY BETTER BE PREPARED TO TESTIFY AT 1:30 TODAY IF WE DON'T HAVE ANOTHER WITNESS.

MR. RUBIN [Counsel for the City]: DO YOU WANT THE OFFER OF PROOF?

THE COURT: YES, OFFER OF PROOF.

MR. RUBIN: OKAY. MS. DRAFFIN WILL TESTIFY BASED UPON DISCUSSIONS WITH DISNEY AND CITY REPRESENTATIVES, NOT ON PRIVATE DISCUSSIONS WITH CITY REPRESENTATIVES, BUT ON DISCUSSIONS WITH CITY AND DISNEY REPRESENTATIVES, NUMBER ONE, AND BASED UPON DISCUSSIONS SHE HAD WITH DISNEY ATTORNEYS RELATING TO THE FOLLOWING ITEMS: NUMBER ONE, SECTION 41(U) OF THE LEASE.

IT HAS BEEN REPRESENTED AND ASSERTED BY ANGELS BASEBALL THAT ***41(U) WAS INTENDED TO LIST ALL OF THE BENEFITS THE CITY GOT UNDER THE LEASE, AND THE FACT THAT THE NAME OF THE TEAM IS NOT LISTED AS A BENEFIT, THAT SOMEHOW INDICATES THAT EITHER IT WASN'T SUPPOSED TO GO TO THE CITY, OR THAT IT WAS SUPPOSED TO BE SUPERSEDED, OR THAT IT WAS UNIMPORTANT.***

MS. DRAFFIN WILL TESTIFY THAT -- EXACTLY WHY 41(U) WAS PUT IN THE LEASE. SHE WILL TESTIFY AS TO THE DISCUSSIONS SHE HAD WITH DISNEY ATTORNEYS AS TO THE NEED FOR 41(U). THOSE DISCUSSIONS OCCURRED ON MARCH -- EXCUSE ME. THOSE DISCUSSIONS OCCURRED ON MAY 13, 14 TIME PERIOD. AND THE LANGUAGE OF 41(U) WAS FAXED TO HER APPROXIMATELY 3:15 P.M. ON THE DAY THE LEASE WAS APPROVED, MAY 14, 1996. ***IT WAS PUT IN PURSUANT TO DISCUSSIONS SHE HAD WITH DISNEY'S COUNSEL AND WITH BOTH PARTIES' BOND COUNSEL -- THEY BOTH HAD SPECIAL BOND COUNSEL -- AND WAS PUT IN TO DEAL WITH ONE LIMITED PROBLEM THAT WAS IDENTIFIED BY BOND COUNSEL*** THAT WERE REVIEWING THE, BASICALLY, LAST DRAFT OR SECOND TO LAST DRAFT OF THE LEASE. AND ***THAT PROBLEM WAS THE CONSTITUTIONAL DEBT LIMITATION, AND THAT THE CONSTITUTIONAL DEBT LIMITATION CREATED A PROBLEM BECAUSE A CITY IS NOT ENTITLED TO INCUR DEBT OR AGREE TO PAY MONEY PAST THE INCOME THAT IT HAS FOR ANY YEAR.*** THERE IS AN EXCEPTION TO THAT WHEN YOU ENTER INTO A LEASE. AND WHEN THE CITY IS A TENANT TO A LEASE, IT CAN AGREE DUE TO AN EXCEPTION IN THE CONSTITUTIONAL DEBT LIMITATION TO MAKE PAYMENTS THAT OCCUR OVER THE PERIOD OF THE LEASE.

BUT IN THIS CASE, THE CITY WAS NOT THE TENANT TO THE LEASE. IT WAS THE LANDLORD. YET, STILL, THE CITY HAD TO MAKE CERTAIN PAYMENTS. THAT IS, IT HAD TO MAKE A PAYMENT OF \$50,000 -- EXCUSE ME -- \$500,000 EACH YEAR INTO A RESERVE FUND FOR THE MAINTENANCE OF THE STADIUM. AND THAT AND A COUPLE OF OTHER PAYMENTS WERE IDENTIFIED AS PROBLEMS WITH THE CONSTITUTIONAL DEBT

LIMITATION, BOTH BY DISNEY'S ATTORNEYS AND THE CITY ATTORNEYS. AND AS A RESULT, **THEY CRAFTED THIS LANGUAGE THAT TIED THE CITY'S OBLIGATION TO MAKE PAYMENTS UNDER THE LEASE -- SOMETHING THAT IS RARE FOR A LANDLORD TO HAVE TO DO, BUT IT WAS THE CASE HERE -- TO A SPECIFIC OBLIGATION THAT RELATED TO THE TENANT'S USE OF THE PROPERTY.** AND THERE WAS NO NEED TO IDENTIFY ANY OTHER BENEFITS IN THE LEASE IN ORDER TO ACCOMPLISH THAT PURPOSE. AND THOSE WERE ALL PURSUANT TO DISCUSSIONS BETWEEN THE PARTIES. SHE WILL TESTIFY, YOUR HONOR, REGARDING 22(C), AND REGARDING THE LANGUAGE THAT HAS BEEN MUCH DISCUSSED BY ANGELS BASEBALL IN THEIR QUESTIONING. AND SHE WILL TESTIFY THAT 22(C) WAS DISCUSSED WITH DISNEY'S ATTORNEYS. AND **THE DISCUSSION WITH DISNEY'S ATTORNEYS WAS NOT THAT THE TEAM WOULD HAVE DISCRETION TO ACT WITH DISREGARD TO THE COVENANTS OF THE LEASE.** AND THERE ARE MANY, MANY COVENANTS OF THE LEASE THAT WOULD BE IMPLICATED IF THE TEAM HAD THE RIGHT TO DISREGARD THEM UNDER 18 22(C). BECAUSE 22(C) IS NOT ONLY -- DOESN'T ONLY DEAL WITH MARKETING. IT DEALS WITH MARKETING, OPERATIONS, THAT IS, EVERYTHING THEY DO. IT DEALS WITH LICENSING. IT DEALS WITH TICKETING, ADVERTISING, JUST ABOUT EVERYTHING THE TEAM DOES.

**AND IF THEY HAD SOLE DISCRETION TO TAKE ANY ACTIONS UNDER THAT CLAUSE TO DO WHATEVER THEY WANTED TO DO WITH RESPECT TO OPERATIONS, WITH RESPECT TO MARKETING, WITH RESPECT TO LICENSING, THAT WOULD ESSENTIALLY MEAN THAT EVERY OTHER COVENANT OF THE LEASE EXCEPT THOSE TWO, 22(A) (SIC) AND 41(U) THAT ARE SPECIFICALLY REFERENCED, WOULD BE WIPED OUT.** THAT WOULD MEAN THAT THE TEAM'S OBLIGATIONS TO PLAY ITS GAMES AT THE STADIUM SET FORTH IN 7(A) WOULD BE SUPERSEDED. BECAUSE, AFTER ALL, THAT'S AN OPERATION OF THE TEAM. AND, IN FACT, IRONICALLY, 41(U) THAT REFERS TO THE TEAM PLAYING ITS GAMES AT THE STADIUM ONLY RELATES TO LIMITED OBLIGATION. IT SAYS THAT THE CITY'S OBLIGATION TO MAKE THE \$500,000 A YEAR PAYMENT AND SOME OTHER RATHER MINOR PAYMENTS IS CONDITIONED UPON THEIR PLAYING THEIR GAMES. BUT IT WOULD BE VERY EASY TO GIVE UP THOSE OBLIGATIONS, TO GIVE UP THE RIGHT TO RECEIVE \$500,000 A YEAR IF THE TEAM GOT A LUCRATIVE OFFER, IF THAT WAS THE ONLY THING THAT REQUIRED THE TEAM TO PLAY THEIR GAMES AT THE STADIUM. 7(A) WAS THE OBLIGATION TO PLAY THEIR GAMES AT THE STADIUM, AND THAT WOULD BE WIPED OUT AS AN OPERATIONAL PROVISION UNDER 22(C) IF INTERPRETED THE WAY ANGELS BASEBALL IS INTERPRETING IT. THE OBLIGATION UNDER 11(A) THAT **ANAHEIM BE IN THE NAME OF THE STADIUM WOULD BE WIPED OUT BECAUSE, AFTER ALL, THAT'S A RIGHT THAT THE TEAM HAS FOR LICENSING PURPOSES.**

THE COURT: I UNDERSTAND YOUR ARGUMENT. WERE THERE ANY **OTHER AREAS**?

MR. RUBIN: **IT GOES ON AND ON.**

THE COURT: ALL RIGHT.

MR. RUBIN: SHE WILL TESTIFY AS TO **DISCUSSIONS -- THERE'S A LIST, OF COURSE, OF ABOUT 20 DIFFERENT THINGS THAT WOULD BE WIPED OUT. WE WON'T TALK ABOUT ALL OF**

**THEM. BUT THERE'S A LONG LIST, INCLUDING TRIVIAL THINGS LIKE HOLDING FLEA MARKETS IN THE STADIUM PARKING LOT. THAT'S AN OPERATIONAL PROVISION. THAT WOULD BE WIPED OUT BECAUSE IT'S NOT REFERENCED IN 22(C).**

MR. GUILFORD: [Counsel for the City]: **YOUR HONOR, HE SPENT MOST OF THEIR CROSS-EXAMINATION TALKING TO LAYPEOPLE ABOUT THE TERMS OF THE LEASE. WE THINK IT'S APPROPRIATE TO HAVE ANOTHER REPRESENTATIVE OF THE CITY WHO TALKS ABOUT THE TERMS OF THE LEASE.**

THE COURT: IS THERE ANOTHER AREA?

MR. RUBIN: YES, YOUR HONOR.

THE COURT: YES.

MR. RUBIN: SHE WILL TALK ABOUT THE DISCUSSIONS THAT SHE HAD WITH DISNEY ATTORNEYS REGARDING WHY 22(C) WAS IN THE LEASE. SHE WILL INDICATE THAT **THE PURPOSE, INSTEAD OF ELIMINATING THE COVENANTS OF THE LEASE, WAS TO PROTECT DISNEY FROM HAVING TO ADOPT POLICIES AND PROCEDURES IN THE FUTURE THAT THEY HAD NOT AGREED TO IN THE LEASE WHICH WOULD BE FOISTED UPON THEM BY THE CITY** OR BY SOME IMPLICATION; AND THAT AMONG THOSE POLICIES AND PROCEDURES THAT DISNEY WAS CONCERNED ABOUT WAS A PROVISION IN THE LEASE THAT SAYS THAT IF THERE'S ANY PERSONAL SEAT LICENSES, P.S.L.'S -- AND THAT'S BASICALLY A -- SOMETHING THAT'S SOLD TO A SEASON TICKET HOLDER SO THAT IN FUTURE YEARS, THEIR SEASON -- THEIR SEAT WILL NOT BE GIVEN TO SOMEBODY ELSE. AND IT'S USED AS A REVENUE-CREATING DEVICE IN SOME STADIUMS. OTHERWISE, THERE IS POTENTIALLY A RIGHT TO LOSE YOUR SEATS, EVEN THOUGH YOU'VE PAID YOUR -- FOR YOUR SEASON SEATS. THERE'S NO GUARANTEE IN THE FUTURE, AND A PERSONAL SEAT LICENSE WOULD GUARANTEE YOU THE RIGHT TO THIS SEAT FOR "X" NUMBER OF YEARS IN THE FUTURE.

AND THERE WAS A PROVISION THAT WAS PUT IN THE LEASE IF THE TEAM SELLS PERSONAL SEAT LICENSES, THAT DISNEY WOULD GET -- EXCUSE ME -- THAT THE CITY WOULD GET 20 PERCENT OF THE INCOME.

**DISNEY WAS CONCERNED ABOUT PUTTING THAT IN AND THOUGHT THAT THAT MIGHT CREATE AN IMPLICATION THAT THEY MIGHT HAVE TO ADOPT A PERSONAL SEAT LICENSE POLICY IN THE FUTURE.**

**SO 22(C) WAS PUT IN TO AVOID THE IMPLICATION THAT THEY WOULD HAVE TO ADOPT POLICIES AND PROCEDURES IN THE FUTURE BY IMPLICATION,** SOMETHING OTHER THAN COVENANTS. IT WASN'T PUT IN TO ELIMINATE COVENANTS AND OBLIGATIONS OF THE LEASE, BUT THESE POTENTIAL OBLIGATIONS TO CREATE POLICIES AND PROCEDURES IN THE FUTURE.

ANOTHER EXAMPLE THAT SHE WILL SAY WAS DISCUSSED WITH DISNEY ATTORNEYS, A CONCERN, WAS THERE'S A REQUIREMENT UNDER THE LEASE THAT THE TEAM AND THE CITY TRIED TO HARMONIZE THE OPERATIONS OF THE STADIUM AND THE PARKING LOT WITH THE SPORTSTOWN DEVELOPMENT THAT WAS CONTEMPLATED AND SPECIFICALLY SET FORTH IN THE LEASE. AND BECAUSE THERE WAS THIS PROVISION ABOUT HARMONIZING THAT, THERE WAS CONCERN BY DISNEY OF WHAT THE IMPLICATIONS MIGHT BE. DOES THAT MEAN THAT THEY HAVE TO ADOPT CC&R'S THAT WERE COMPATIBLE WITH THE SPORTSTOWN, AND DOES THAT MEAN IF A MERCHANTS ASSOCIATION IS SET UP FOR

SPORTSTOWN, THAT THEY HAVE TO JOIN IT AND ENGAGE IN JOINT ADVERTISING?

**SO 22(C) GAVE THE PROTECTION TO DISNEY THAT THEY WOULDN'T HAVE TO ADOPT SUCH FUTURE POLICIES AND PROCEDURES BECAUSE THIS WAS NOT A COVENANT OF THE LEASE. SO SHE WILL TESTIFY TO THAT. AND THAT'S ALL BASED UPON DISCUSSIONS WITH DISNEY ATTORNEYS.**

SHE'LL TALK ABOUT 11(F), OF COURSE. AND SHE'LL TALK ABOUT WHAT WAS DISCUSSED WITH DISNEY ATTORNEYS RELATING TO 11(F) AND WHAT WAS DISCUSSED WITH CITY AND DISNEY PEOPLE RELATING TO 11(F) AND HOW WITH THOSE DISCUSSIONS AND BASED UPON THAT THE LANGUAGE WAS CHOSEN AND USED. THAT'S IN 11(F).

SHE WILL TALK ABOUT DISCUSSIONS THAT OCCURRED RELATING TO CUSTOM AND PRACTICE BETWEEN DISNEY AND THE CITY AND HOW THAT AFFECTED THE LANGUAGE IN 11(F). SHE WILL TALK ABOUT THE PHRASE "TEAM NAME" AND HOW THAT AFFECTS THE WAY 11(F) IS VIEWED.

**SHE WILL TALK ABOUT THE THREE TOOLS THAT MR. GUILFORD RELATED TO; THAT IS, HOW THE INTENT OF THE PARTIES AS EXPRESSED IN THE DISCUSSIONS SHE HEARD BETWEEN DISNEY AND THE CITY WAS INCORPORATED INTO 11(F); HOW THE CUSTOM AND PRACTICE PURSUANT TO THE DISCUSSIONS WAS INCORPORATED INTO 11(F), AND HOW THIS WAS ULTIMATELY IMPLEMENTED BY THE CONDUCT OF THE PARTIES.**

YOUR HONOR, **I CAN'T GO THROUGH EACH AND EVERY ITEM** THAT --

THE COURT: WELL, IF YOU HAVE SOMETHING THAT YOU THINK IS IMPORTANT AND CRITICAL IN YOUR CASE THAT SHE'S GOING TO TESTIFY TO, THAT -- YOU BETTER MAKE YOUR OFFER NOW.

MR. RUBIN: OKAY.

SHE WILL TESTIFY TO WHY -- SHE WILL TESTIFY TO THE LANGUAGE THAT'S BEEN PUT ON A POSTER BOARD HERE THAT WAS PROPOSED THAT 11(F) READ, THE NAME OF THE TEAM WILL BE ANAHEIM ANGELS. AND SHE WILL DISCUSS WHAT THE RESPONSE WAS TO THAT REQUEST, WHAT WAS TOLD TO HER, AND WHAT THE PURPOSE OF THAT WAS AND WHY IT WAS ACCEPTABLE TO JUST GO BACK TO THE PRIOR LANGUAGE.

THAT'S MY OFFER OF PROOF, YOUR HONOR.

THE COURT: OKAY. ALL RIGHT. THANK YOU. WE'LL BE IN RECESS UNTIL 1:30.